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The Anonymous Accused: Protecting Defendants' Rights in High-Profile Criminal Cases

Jaime N. Morris

THE ANONYMOUS ACCUSED: PROTECTING DEFENDANTS' RIGHTS IN HIGH-PROFILE CRIMINAL CASES

Abstract: The public's interest in high-profile crimes and the media's coverage of high-profile trials have significantly increased over the past fifty years, raising significant concerns about a high-profile defendant's right to a fair trial. This Note examines how pretrial publicity can affect the fairness of a high-profile criminal case and how courts have attempted to protect a high-profile defendant's Sixth Amendment right to a fair trial while still assuring the media's First Amendment right to freedom of the press. Specifically, the Note discusses and analyzes court-made remedies as well as new remedies scholars have proposed to protect a high-profile criminal defendant's right to a fair trial. Finding such remedies ineffective, the Note considers whether defendant anonymity, which courts can apply in civil trials, could be an effective protection of a high-profile defendant's right to a fair trial.

INTRODUCTION

In 1941, in *Bridges v. California,* United States Supreme Court Justice Hugo Black stated, "Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper."[1] In the last decade, it seems as though Justice Black's fear that legal battles would be waged in the media has come to fruition.[2] The public's interest in high-profile criminal cases has grown dramatically over the last decade, increasing the difficulty of finding impartial decisionmakers.[3] Because such a highly publicized atmosphere surrounds potential jurors, these triers of fact may be influenced as to the guilt or innocence of a high-profile defendant before the trial even begins.[4]

Without question, high-profile criminal cases receive a great amount of attention from the media.[5] Over the past ten years, the media has brought many cases into our living rooms through exten-

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[1] 314 U.S. 252, 271 (1941).

[2] *See id.*

[3] *See* Laurie Nicole Robinson, Note, *Professional Athletes—Held to a Higher Standard and Above the Law: A Comment on High-Profile Criminal Defendants and the Need for States to Establish High-Profile Courts*, 73 IND. L.J. 1313, 1313 (1998).

[4] *Id.*

[5] *See id.*

sive television and print coverage of high-profile criminal trials.[6] There are basically three types of high-profile cases: (1) cases with sexual or sordid facts that appeal to people's voyeuristic tendencies, even though the murderer or victims are most likely non-celebrities;[7] (2) cases in which the crime is particularly heinous;[8] and (3) cases in which the defendants are national celebrities or otherwise well-known throughout their local area, but the crime itself is not sordid or heinous enough to draw the attention of the media without the celebrity status of the defendant.[9] In each of these types of cases, a trial judge has the obligation to assure that the defendants receive a fair trial in which an impartial jury determines their guilt or innocence.[10]

Depending on the story the media relays to the public, the intense media coverage surrounding high-profile criminal cases can either destroy a defendant's chances for a fair trial[11] or ultimately benefit the defendant.[12] Pretrial publicity work against a high-profile defendant because the media coverage can often negatively preju-

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[6] *See id.*

[7] *See* PETER E. KANE, MURDER, COURTS, AND THE PRESS: ISSUES IN FREE PRESS/FAIR TRIAL 63 (1986); Robinson, *supra* note 3, at 1313 (stating high-profile cases include the Amy Fisher case, the Lorena Bobbit case, and the Tonya Harding case).

[8] *See* KANE, *supra* note 7, at 63. The Manson Family murders and the Rodney King beating are classic examples of cases that are high profile due to the bizarre or disturbing nature of the facts surrounding the case.

[9] Robinson, *supra* note 3, at 1313; *see* KANE, *supra* note 7, at 63. Examples of this type of case include the following celebrity defendants: Sam Sheppard (he was a prominent local doctor); Mike Tyson; Robert Downey, Jr.; Jayson Williams; Sean "P. Diddy" Combs; and Snoop Dogg. Some cases, such as the O.J. Simpson case, have both heinous or sordid fact patterns and a well-known defendant. Thus, the lines between the three types of high-profile criminal cases are not always distinct. *See* KANE, *supra* note 7, at 63.

[10] KANE, *supra* note 7, at 63.

[11] *See* Robinson, *supra* note 3, at 1327. For example, the United States Supreme Court was both shocked and outraged by the inherent unfairness of Sam Sheppard's murder trial caused by extensive media coverage surrounding the case. *See* Sheppard v. Maxwell, 384 U.S. 333, 355 (1966). The "media circus" surrounding the trial ultimately resulted in Dr. Sheppard's first-degree murder conviction. *See id.*

[12] *See* Robinson, *supra* note 3, at 1330 ("[I]t is important to remember that, at least for [O.J.] Simpson, the pretrial publicity ultimately inured to his benefit, as the jury acquitted him on both murder counts."). Another such criminal defendant that seems to have benefited not only from the intense media coverage surrounding his case but also from his celebrity status is Sean "P. Diddy" Combs. *See* Marcus Errico, *Puffy Not Guilty!, E! Online News* (Mar. 16, 2001), *at* http://www.eonline.com/News/Items/0,1,7973,00.html. In 2001, a jury found Bad Boy records mogul Sean Combs not guilty of four counts of criminal gun possession and one count of bribing a witness despite a plethora of seemingly incriminating evidence presented against him over the course of a seven-week trial. *Id.*

dices the potential pool of jurors against a defendant.[13] Because pretrial publicity can have disastrous effects on the fairness of high-profile criminal cases, courts have struggled over the past fifty years to fashion remedies that protect defendants in high-profile cases from being prematurely convicted by a jury due to negative media coverage.[14]

To make it more likely that an impartial jury will try a defendant, courts are armed with an arsenal of devices designed to minimize the prejudicial effects caused by excessive media coverage in a high-profile case.[15] These devices include: gag orders on trial participants, prior restraints on the media, voir dire, special jury instructions, sequestration, postponement, and change of venue.[16] Although courts still employ these techniques, in many cases, the use of one or more of them has not proven sufficient to protect an accused's right to a fair trial.[17]

This Note proposes a new solution to the problem of protecting the high-profile criminal defendant's Sixth Amendment right to a fair trial in a media-dominated atmosphere.[18] In civil trials, courts may keep a plaintiff's identity anonymous throughout the trial even though the Federal Rules of Civil Procedure require plaintiffs to disclose their names in the instrument they file to commence a lawsuit.[19] Courts will allow plaintiffs to depart from this "procedural custom fraught with constitutional overtones" to accommodate a plaintiff's asserted need to proceed anonymously through the use of a fictitious name.[20] This Note argues that allowing a high-profile criminal defen-

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[13] *See* Robinson, *supra* note 3, at 1325. This Note acknowledges that pretrial publicity can also benefit a high-profile criminal defendant during a trial. *See id.* Nevertheless, this Note focuses only on how pretrial media coverage negatively impacts a defendant's right to a fair trial. *See infra* notes 29–43 and accompanying text. Moreover, this Note recognizes that anonymity could help the prosecution in cases where the defendant could use his celebrity status to get special treatment from the jury. *See* Robinson, *supra* note 3, at 1325.

[14] *See* Charles H. Whitebread & Darrell W. Contreras, *Free Press v. Fair Trial: Protecting the Criminal Defendant's Rights in a Highly Publicized Trial by Applying the* Sheppard-Mu'Min *Remedy*, 69 S. CAL. L. REV. 1587, 1588 (1996).

[15] Robinson, *supra* note 3, at 1334.

[16] *Id.*

[17] Report of the Judicial Conference Committee on the Operation of the Jury System on the "Free Press—Fair Trial" Issue, 45 F.R.D. 391, 413 (1968), *revised by* 87 F.R.D. 519 (1980).

[18] *See infra* notes 301–368 and accompanying text.

[19] FED. R. CIV. P. 10(a).

[20] Doe v. Stegall, 653 F.2d 180, 185 (5th Cir. 1981); *see* Roe v. Aware Woman Ctr. for Choice, Inc., 253 F.3d 678, 684–85 (11th Cir. 2001); S. Methodist Univ. Ass'n of Women Law Students v. Wynne & Jaffe, 599 F.2d 707, 712–13 (5th Cir. 1979).

dant to proceed anonymously can safeguard a the defendant's right to a fair trial both by shielding potential jurors from prejudicial pretrial publicity about the particular defendant and by preventing any juror exposure to pretrial publicity from biasing his or her decision-making ability during the trial.[21]

Section I of this Note explores remedies trial courts use to minimize the prejudicial impacts of pretrial publicity on a high-profile defendant's right to a fair trial.[22] Section II discusses new remedies scholars have proposed as possible solutions to the problem of extensive pretrial publicity in high-profile criminal cases.[23] This section explains how the proposed solutions would operate.[24] Section III focuses on party anonymity in civil trials and what factors courts look at to decide if a case is one in which party anonymity is necessary.[25] Section IV explains the ineffectiveness of the remedies courts currently utilize to protect a high-profile defendant's rights in a media-dominated atmosphere.[26] Section V analyzes the effectiveness of new solutions scholars have proposed to remedy the problem of pretrial publicity in high-profile criminal cases.[27] Finally, Section VI argues by analogy that party anonymity, as it is used in civil trials, would effectively protect a high-profile criminal defendant's Sixth Amendment right to a fair trial despite any pretrial publicity that might have occurred.[28]

I. Current Remedies Courts Use in High-Profile Criminal Cases to Protect Defendants' Right to a Fair Trial

When fashioning a remedy to protect a high-profile defendant's right to a fair trial, a trial judge must balance the accused's Sixth Amendment right to a fair trial with the media's First Amendment right to freedom of the press.[29] Indeed, a high-profile defendant's

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[21] *See infra* notes 301–368 and accompanying text.

[22] *See infra* notes 29–122 and accompanying text.

[23] *See infra* notes 123–180 and accompanying text.

[24] *See infra* notes 123–180 and accompanying text.

[25] *See infra* notes 181–210 and accompanying text.

[26] *See infra* notes 211–278 and accompanying text.

[27] *See infra* notes 279–300 and accompanying text.

[28] *See infra* notes 301–368 and accompanying text.

[29] *See* Robert S. Stephen, *Prejudicial Publicity Surrounding a Criminal Trial: What a Trial Court Can Do To Ensure a Fair Trial in the Face of a "Media Circus,"* 26 Suffolk U. L. Rev. 1063, 1063 (1992); Whitebread & Contreras, *supra* note 14, at 1588. The First Amendment of the United States Constitution states: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. Const. amend. I. The Sixth Amendment provides:

Sixth Amendment right to a fair trial often conflicts with the media's First Amendment right of freedom of the press.[30] Trial by an unbiased jury is one of the rights the Sixth Amendment guarantees defendants.[31] Chief Justice John Marshall wrote, "[T]he great value of the trial by jury certainly consists in its fairness and impartiality. Those who most prize the institution, prize it because it furnishes a tribunal which may be expected to be uninfluenced by an undue bias of mind."[32] In both state and federal courts, permitting a biased jury to decide a criminal defendant's fate fundamentally denies the defendant of due process of law.[33]

A jury of one's peers has long been recognized as key to protecting defendants from arbitrary state action.[34] Defining what constitutes an impartial jury, however, has plagued courts for quite some time.[35] The presence of the mass media has only intensified the problem.[36] One commentator notes, "[A]s criminal procedure and the rules of evidence became more formalized, it became important to find jurors sufficiently unbiased and removed from the facts to decide the case based solely on the evidence presented in court, and not by extrajudicial knowledge."[37] Indeed, extensive pretrial publicity makes it very difficult to find jurors who are impartial enough not to decide the case based on information obtained outside the courtroom.[38] Chief Justice Marshall explains:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI.

[30] *See* Whitebread & Contreras, *supra* note 14, at 1588.

[31] MATTHEW D. BUNKER, JUSTICE AND THE MEDIA: RECONCILING FAIR TRIALS AND A FREE PRESS 41 (1997).

[32] United States v. Burr, 25 F. Cas. 49, 50 (Va. Cir. Ct. 1807) (No. 14,692).

[33] BUNKER, *supra* note 31, at 41.

[34] *Id.* ("The presence of jurors precluded secret trials, secured the citizenry from venal judges, purchased testimony, or threatening officials, and protected them from other abuses by governments unconcerned with the liberties of its people."); *see* DAVID J. BODENHAMER, FAIR TRIAL: RIGHTS OF THE ACCUSED IN AMERICAN HISTORY 32 (1992).

[35] BUNKER, *supra* note 31, at 41.

[36] *Id.*

[37] *Id.*

[38] *See id.*

> Such a person [a juror possessing a fixed opinion about the guilt of the accused] may believe that he will be regulated by testimony, but the law suspects him, and certainly not without reason. He will listen with more favor to that testimony which confirms, than to that which will change his opinion; it is not to be expected that he will weigh evidence or argument as fairly as a man whose judgment is not made up in the case.[39]

Because high-profile cases generate such extensive pretrial publicity, judges must employ certain devices that make it more likely that the impaneled jury is an impartial one.[40]

High-profile criminal cases receive national media attention during the investigatory and pretrial proceeding and typically involve the following types of cases: those that involve sordid facts but lack a celebrity defendant or victim; those in which the nature of the crime is heinous; and those that involve a famous defendant or victim.[41] The national media coverage each of these types of cases receives increases the difficulty of finding impartial decisionmakers.[42] Thus, courts have employed the remedies described below to decrease the negative effects pretrial publicity has on the fairness of high-profile criminal cases.[43]

A. *Gag Orders on Trial Participants*

A court may employ a gag order to restrain trial participants from making extrajudicial statements when there is a reasonable likelihood that prejudicial publicity may prevent a fair trial.[44] By issuing a gag

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[39] *Burr*, 25 F. Cas. at 50.

[40] *See* Robinson, *supra* note 3, at 1334.

[41] *Id.* at 1313.

[42] *Id.*

[43] *See id.* at 1334.

[44] *See* Stephen, *supra* note 29, at 1084. In the federal corruption case against Providence Mayor Vincent A. Cianci Jr., United States District Court Judge Ernest C. Torres issued a gag order prohibiting the defendants, their lawyers, prosecutors, witnesses, potential witnesses, law-enforcement officials involved in the investigation, and court personnel from releasing information outside that in the public record. Tracy Breton, *Operation Plunder Dome: Judge Acts to Silence All Talk in Case*, PROVIDENCE J.-BULL., May 16, 2001, at 1A. The judge put the gag order into effect until the final verdicts were entered; people caught violating the order would be held in contempt of court. *Id.* Judge Torres said that the purpose of the gag order was "to protect the rights of both the defendants and the United States to a fair trial before an impartial jury by prohibiting the kinds of extrajudicial statements and disclosures that, if widely disseminated, would be likely to threaten those rights

order, a trial court may prohibit lawyers, witnesses, jurors, court personnel, and others directly involved with the trial from making any harmful extrajudicial statements outside the courtroom setting.[45] In 1966, in *Sheppard v. Maxwell,* the United States Supreme Court stated that the trial court should have proscribed extrajudicial statements by trial participants due to the intense media scrutiny surrounding the case.[46] There, Dr. Sam Sheppard, accused of murdering his pregnant wife, was subject to extensive media scrutiny from the beginning of the ordeal.[47] First, the media reported Sheppard's refusal to take a lie detector test.[48] In addition, the local coroner questioned Sheppard in the presence of television, radio, and newspaper reporters, as well as several hundred spectators.[49] Moreover, the police arrested Sheppard and charged him with murder just hours after a front-page editorial appeared asking, "Why Isn't Sam Sheppard in Jail?"[50] This intense media scrutiny continued throughout the trial, exposing potential jurors to the coverage.[51] The Court held that the trial court's failure to protect Sheppard from the prejudicial publicity denied him his right to a fair trial in violation of due process.[52] Furthermore, the Court asserted that the trial court should have controlled the release of information to the media.[53] The Court stated that it would permit a trial judge to issue a gag order to prevent trial participants from frustrating the proper functioning of court proceedings in circumstances

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and the integrity of the trial process." *Id.* He further stated that: "The need for this order arises from the intensive media coverage of this case. . . . There have been a number of widely publicized disclosures and statements by individuals involved in this case which, if allowed to continue, would create a substantial risk of prejudicing the parties' right to a fair trial." *Id.*

[45] *See id.*

[46] *See* 384 U.S. 333, 361 (1966).

[47] *See id.* at 338–39; Stephen, *supra* note 29, at 1071.

[48] *See Sheppard,* 384 U.S. at 339.

[49] *See id.* When Sheppard's counsel tried to participate in this questioning, which was broadcast live, he was forcibly ejected by the coroner, who received cheers from the crowd. *Id.* at 340.

[50] *See Sheppard,* 384 U.S. at 341.

[51] *See id.* at 345. When jurors viewed the murder scene, they were accompanied by hundreds of reporter, onlookers, and a helicopter from which reporters took pictures. Stephen, *supra* note 29, at 1072–73. During sequestered deliberations, photographers took pictures of jurors for a local newspaper. *Id.* at 1073. Sheppard was subsequently convicted of second-degree murder. *Id.*

[52] *See Sheppard,* 384 U.S. at 335.

[53] *See id.* at 361–62.

where pretrial publicity would threaten a defendant's constitutional right to a fair trial.[54]

B. *Prior Restraints on the Media*

A similar, yet more drastic, device available to courts is a prior restraint, which prohibits the media from publishing any information that threatens the defendant's right to a fair trial.[55] Although arguably the most powerful device in preventing the rapid spread of prejudicial publicity, such orders come with a high presumption of invalidity under the First Amendment and therefore remain highly ineffective.[56] The United States Supreme Court has stated clearly that prior restraints are not permissible in open trial proceedings.[57]

In 1976, in *Nebraska Press Ass'n v. Stuart*, the United States Supreme Court set out a three-part balancing test for a trial court to use in analyzing the constitutionality of allowing a prior restraint in a criminal trial.[58] In determining whether prior restraints are a viable option, courts must consider the following: (1) "the nature and extent of pretrial news coverage;" (2) "whether other measures would likely mitigate the effects of unrestrained pretrial publicity;" and (3) "how effectively a restraining order would operate to prevent the threatened danger."[59] Trial courts may not utilize prior restraints to protect a defendant's rights if other, less restrictive alternatives are available.[60]

In *Nebraska Press*, the defendant was accused of killing almost the entire Kellie family, including the grandfather, the grandmother, their son, and three minor grandchildren.[61] Once news media received word of the crime, a local radio station immediately broadcasted a police bulletin warning of an armed sniper in the area.[62] The news media urged everyone to stay indoors, and several businesses shut down.[63] By the next day, news of the crime had spread all over town.[64] The police found the defendant lurking behind the Kellie residence

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[54] *See id.* at 361.
[55] *See* Stephen, *supra* note 29, at 1083.
[56] *See id.*
[57] Whitebread & Contreras, *supra* note 14, at 1590.
[58] *See* 427 U.S. 539, 562 (1976).
[59] *Id.*
[60] *See id.* at 565.
[61] KANE, *supra* note 7, at 33.
[62] *Id.*
[63] *Id.*
[64] *Id.*

the day after the murders; the court arraigned him that day.[65] The day after his arraignment, the story of the murders and the defendant's arrest for the crime dominated the news on the radio, television, and in the print media.[66] The press revealed that the defendant had admitted the murder to his parents and confessed to the murders to the police.[67] Widespread public speculation regarding the motive for the crime and the defendant's mental state filled the small community.[68]

In the factual circumstances outlined above, the *Nebraska Press* Court did not uphold the prior restraint ordered by the trial judge.[69] The Court did find that the trial judge was "justified in concluding that there would be intense and pervasive pretrial publicity" and was acting reasonably to believe "that publicity might impair the defendant's right to a fair trial."[70] Nevertheless, the Court did not uphold the prior restraint because the trial judge did not consider other alternatives less threatening to First Amendment rights.[71] The Court also did not allow the prior restraint because the defense did not meet the heavy burden of demonstrating that, without prior restraints, the defendant would not receive a fair trial.[72] For the majority, Chief Justice Warren Burger asserted, "It is not clear that further publicity, unchecked, would so distort the views of potential jurors that . . . [they could not render] a just verdict exclusively on the evidence presented in open court."[73] Because of the tight restrictions on the use of prior restraints, their use as a remedy to prejudicial pretrial publicity is severely constrained.[74]

Earlier cases dealing with prior restraints on the media were limited to print and press media.[75] In recent years, however, trial coverage has expanded to include television coverage of high-profile criminal trials.[76] The United States Supreme Court has not directly determined whether banning television cameras in the courtroom is an unconstitutional prior restraint.[77] In 1981, in *Chandler v. Florida*,

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[65] *Id.*
[66] KANE, *supra* note 7, at 34.
[67] *Id.*
[68] *Id.*
[69] *See* 427 U.S. at 613.
[70] *Id.* at 562–63.
[71] *See id.* at 565.
[72] *Id.* at 569.
[73] *Id.*
[74] *See Neb. Press*, 427 U.S. at 569.
[75] Whitebread & Contreras, *supra* note 14, at 1594.
[76] *See id.*
[77] *See id.*

the United States Supreme Court held that states are free to permit electronic media to cover a trial and doing so does not, by itself, deny a defendant's right to a fair trial.[78] An exception to this rule states, however, that if a defendant can show that "media coverage of his case—be it printed or broadcast—compromised the ability of the particular jury that heard the case to adjudicate fairly,"[79] then the trial judge may remove the television cameras.[80] To date, states have the authority to determine whether to permit television coverage in the courtroom; however, television coverage is not typically allowed in federal courtrooms.[81]

C. *Voir Dire*

Another remedy courts may fashion to effectively balance the interests of high-profile defendants and the media is voir dire.[82] Appellate courts often give great weight to thorough voir dire procedures conducted by trial courts.[83] Voir dire typically involves the routine questioning of potential jurors to gauge their competence and potential bias.[84] Voir dire questioning includes inquiries about a potential juror's occupation, family, education, prior convictions, and knowledge of the trial.[85] Because the voir dire process involves an examination designed to determine the extent of jurors' knowledge and prejudices about the case, a trial court can detect any potential juror bias before the trial to secure an impartial jury.[86]

In 1991, in *Mu'Min v. Virginia*, the United States Supreme Court established the current standard for detecting potential juror bias through voir dire.[87] For inquiries about the amount and content of

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[78] *See* 449 U.S. 560, 566–83 (1981); Whitebread & Contreras, *supra* note 14, at 1595.

[79] *Chandler*, 449 U.S. at 575.

[80] *See* Whitebread & Contreras, *supra* note 14, at 1595.

[81] *See id.*

[82] *See* Stephen, *supra* note 29, at 1087.

[83] *Id.*

[84] *See* Whitebread & Contreras, *supra* note 14, at 1600.

[85] *Id.*

[86] KANE, *supra* note 7, at 65.

[87] *See* 500 U.S. 415, 419–21, 431–32 (1991). *Mu'Min* involved a prisoner who murdered a storeowner during a prison furlough program. *Id.* The case received extensive prejudicial pretrial publicity. *Id.* Prior to the trial, the press reported the defendant's juvenile record, parole rejections, and defendant's suspected involvement in a prison beating. *Id.* The press often referred to defendant as a "convicted murderer," "lustful," and "not a model prisoner." *Id.* The defendant was convicted of murder. *Id.* He appealed his conviction, alleging that his right to an impartial jury had been violated because eight of the twelve jurors admitted to having read or heard reports about the case prior to the trial. *Id.*

juror exposure to pretrial publicity to be considered a constitutional requirement under the Sixth Amendment, a high-profile criminal defendant must show that a lack of such questioning would make the trial fundamentally unfair.[88] The Court also stated that a trial judge could sufficiently protect a high-profile defendant's rights by asking potential jurors whether they have formed opinions contradicting the pretrial publicity.[89] Unless the adverse publicity and media attention justify a presumption of prejudice, a court should believe a potential juror's statements about his or her possible biases.[90] In sum, a defendant's questioning of a potential juror about the extent of his or her knowledge of the case is an entitlement to know whether a juror, based on his or her own assessment, can remain impartial despite previously obtained information.[91]

D. *Jury Instructions*

Courts can also give special jury instructions to decrease the prejudicial effects of excessive media coverage on a trial.[92] In high-profile trials, judges often emphasize the jurors' duty to remain impartial during instructions to the jury concerning the law and facts of the case.[93] At times, jury instructions can correct for prejudicial information potential jurors receive prior to sequestration.[94] In 1972, in *People v. Sirhan*, the Supreme Court of California reviewed the defendant's claim that he was denied his right to an impartial jury, which he based on the fact that after jury selection but before sequestration, the *Los Angeles Times* reported a severely prejudicial leak about the defendant's intentions to accept a plea bargain to avoid the death penalty.[95] The trial judge questioned the impaneled jurors about their knowledge of the plea bargain and admonished them to make a deci-

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[88] *See id.* at 430–31.

[89] *See id.*

[90] *See id.*

[91] *See id.*

[92] *See Mu'Min*, 500 U.S. at 430–31.

[93] *See* Stephen, *supra* note 29, at 1090. In 1955, in *Bianchi v. United States*, the United States Court of Appeals for the Eighth Circuit affirmed defendant's conviction where trial court carefully instructed the jury to remain impartial during their deliberations. *See* 219 F.2d 182, 191, 196 (8th Cir. 1955).

[94] Stephen, *supra* note 29, at 1090.

[95] *See* 497 P.2d 1121, 1133 (Cal. 1972), *overruled by* Hawkins v. Superior Court, 586 P.2d 916 (Cal. 1978), *superceded by statute as stated in* Nollins v. Superior Court, 74 Cal. Rptr. 697 (Cal. Ct. App. 1990); J. EDWARD GERALD, NEWS OF CRIME: COURTS AND PRESS IN CONFLICT 80 (1988).

sion based on knowledge gained from the courtroom and not the press.[96] Indeed, this admonition is what ultimately saved the plea bargain and avoided a mistrial.[97] In instances such as these, jury instructions can be crucial in maintaining the fairness of proceedings and in preventing the possibility of a mistrial if the media reports prejudicial information prior to jury sequestration.[98] Due to the nominal cost involved with jury instructions, they are useful in certain situations.[99]

E. *Sequestration*

Jury sequestration is another device available to courts to protect a defendant's right to a fair trial.[100] By restricting the jury's access to extrajudicial information, a court tries to ensure that jurors will reach a verdict based solely on the evidence presented at trial.[101] In 1966, in *Sheppard,* the United States Supreme Court criticized the trial judge for not taking appropriate steps to protect the high-profile defendant's right to a fair trial.[102] The Court suggested that the judge should have sequestered the jury to keep media publicity about the trial from reaching the impaneled jurors.[103]

In 1976, in the *People v. Manson* (the Tate-LaBianca murder case), the California Court of Appeal reviewed the trial judge's decision to sequester the jury, which turned out to be a key move in ensuring the jurors' impartiality.[104] As a result of the sequestration, the jurors were protected from both the extensive procedural arguments in court that might have influenced their attitudes toward the defendants and the widespread extrajudicial discussion of the case by the trial participants during the proceedings.[105] One commentator notes, "This [extrajudicial] discussion and the wide coverage of the trial continued to reinforce the public views of the predetermined guilt of the defen-

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[96] *See Sirhan*, 497 P.2d at 1133 n.7.

[97] *See id.* at 1133.

[98] *See* GERALD, *supra* note 95, at 81; Stephen, *supra* note 29, at 1090.

[99] *See* Stephen, *supra* note 29, at 1090.

[100] *See* Whitebread & Contreras, *supra* note 14, at 1604.

[101] *Id.*

[102] *See Sheppard*, 384 U.S. at 361–62; Whitebread & Contreras, *supra* note 14, at 1604.

[103] *See Sheppard*, 384 U.S. at 363; Whitebread & Contreras, *supra* note 14, at 1604. For example, in 1979, in *Khaalis v. United States*, the District of Columbia Court of Appeals commended the trial court for minimizing the effect of publicity by immediately sequestering the jury. 408 A.2d 313, 335 (D.C. 1979).

[104] *See* 132 Cal. Rptr. 265, 319 (Cal. Ct. App. 1976); KANE, *supra* note 7, at 29.

[105] *See Manson*, 132 Cal. Rptr. at 319; KANE, *supra* note 7, at 29.

dants."[106] Despite the benefits of sequestration, it is only a viable option in cases in which the potential for prejudicing a defendant's right to a fair trial outweighs the exorbitant financial and social costs often associated with sequestration.[107] To avoid imposing unnecessary burdens on both taxpayers and jurors, a rational court would implement sequestration as a remedy only if the benefits to the defendant of having a sequestered jury outweighed any potential costs.[108]

F. *Postponement*

In *Sheppard*, the United States Supreme Court stated that postponement is an action that a trial judge can take to guarantee an impartial jury because it delays the trial until the threat of prejudicial pretrial publicity abates or dies out.[109] The assumption behind postponement is that public attention surrounding a case will actually fade over time.[110] Moreover, trial courts assume that the lapse of time between the appearance of prejudicial news and the trial not only will diminish potential jurors' ability to remember details of a case heard before the trial but also will allow jurors to set aside biases formed before the beginning of the trial.[111]

G. *Change of Venue*

Trial courts can grant a change of venue to another locale where the publicity surrounding a case is not as widespread.[112] Moving a trial from a locale where the publicity is widespread to a region where publicity is not as extensive results in finding a pool of potential jurors

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[106] KANE, *supra* note 7, at 29. Kane states that one example of the media publicity that continued during the Manson trial includes the prospective prosecution witness Virginia Graham. *Id.* Her testimony was particularly damaging to the defense. *Id.* All the lawyers were given a transcript of Graham's intended testimony and were instructed by the judge not to reveal the contents of it to the media. *Id.* The full story of the testimony promptly appeared in the Los Angeles *Herald-Examiner*, which received the transcript from a member of the defense team. *Id.* Had the jury not been sequestered, it would have had the opportunity to read the testimony before it was offered in court. *See id.* at 29–30.

[107] *See* Whitebread & Contreras, *supra* note 14, at 1604. The jury in the Manson murder trial was sequestered for a little over eight months with a total cost of $768,838. *Id.* The Manson trial began in June 1970 and ended in January 1971. *Id.* The O.J. Simpson jurors were sequestered for 266 days for a total cost of $2,985,052. *Id.* at 1612.

[108] *See id.*

[109] 384 U.S. at 363; DOUGLAS S. CAMPBELL, FREE PRESS V. FAIR TRIAL: SUPREME COURT DECISIONS SINCE 1807, at 132 (1994).

[110] *See* Whitebread & Contreras, *supra* note 14, at 1618–19.

[111] GERALD, *supra* note 95, at 77.

[112] *See* Stephen, *supra* note 29, at 1085–86.

who have not had much exposure to pretrial media coverage and who have the ability to render a fair and impartial verdict.[113]

In 1961, in *Irvin v. Dowd*, the United States Supreme Court, for the very first time, overturned a conviction based solely on pretrial publicity.[114] There, an Indiana trial court granted defendant's motion to change the venue to an adjoining county in order to find jurors who had not been exposed to media reports about the case.[115] In *Irvin*, intense media coverage surrounded six murders committed in a rural community.[116] After the police arrested the defendant, the prosecutor issued press releases stating that Irvin had confessed to all of the murders as well as twenty-four burglaries.[117] Before the defendant's trial, newspapers reaching almost all of the residences in the court's county published numerous articles about the case; moreover, local radio and television stations also covered the case extensively.[118] The publicity included information about the defendant's criminal history and murder confessions.[119] Even with the venue change, almost ninety percent of the prospective jurors questioned during voir dire had formed some opinion as to the defendant's guilt before the trial even began.[120] Because the pretrial publicity was so extensive and widespread, the Court in *Irvin* found the trial flawed despite the change in venue.[121] Thus, in high-profile cases where media involvement is overly excessive, a venue change will not always produce a jury entirely unaware of the issues surrounding the case.[122]

II. New Proposals by Scholars to Protect a High-Profile Criminal Defendant's Right to a Fair Trial from the Dangers of Pretrial Publicity

As discussed in Section I, courts have the option of employing several devices to prevent pretrial publicity from interfering with a defendant's right to a fair trial.[123] Because these devices have proven unsuccessful in certain instances, scholars have attempted to craft so-

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[113] Whitebread & Contreras, *supra* note 14, at 1604.
[114] *See* 366 U.S. 717, 728–29 (1961).
[115] *See id.* at 720.
[116] *See id.*
[117] *See id.* at 719–20.
[118] *See id.* at 725.
[119] *See Irvin*, 366 U.S. at 725.
[120] *See id.* at 727.
[121] *See id.* at 728.
[122] *See id.* at 727–28.
[123] *See supra* notes 44–122 and accompanying text.

lutions that would more effectively protect a high-profile defendant's rights to a fair trial.[124] Although alternatives have been suggested, it is uncertain whether they can address effectively the fairness concerns at issue in high-profile cases.[125]

A. *The Establishment of High-Profile Courts*

Because the arsenal of techniques described above are ineffective when applied in high-profile cases, Laurie Nicole Robinson proposes a solution that she believes would help "balance the scales of justice for high-profile defendants."[126] This solution involves the establishment of special high-profile courts to hear only high-profile cases.[127] A high-profile criminal court would essentially take high-profile criminal cases out of the hands of potentially biased jurors and place them into the hands of judges specially trained to deal with high-profile cases.[128]

Robinson asserts that judges selected to preside over high-profile criminal cases should be not only neutral and experienced, but also specially trained.[129] To guarantee high-quality judges, Robinson proposes that state bar associations, which are more familiar with judges' past performance and experience, nominate judges to serve on high-profile courts.[130] Robinson contends that because judges who serve on a high-profile court may be scrutinized or swayed by the media and public opinion, those judges should be appointed for life.[131] Judges considered for a high-profile court should have a minimum of five years' experience in the area of criminal law by serving as a prosecutor, criminal defense lawyer, or judge.[132] Candidates for a high-profile court should also have previous experience adjudicating high-profile cases.[133] Robinson's goal in requiring high-profile judges to have experience in these cases is to ensure that those judges can maintain

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[124] *See infra* notes 126–180 and accompanying text.

[125] *See infra* notes 279–300 and accompanying text.

[126] Robinson, *supra* note 3, at 1339. Robinson drafted this note while a student at Indiana University School of Law—Bloomington. Upon graduation, Robinson became an associate in the New York office of Epstein, Becker & Green.

[127] *Id.*

[128] *Id.*

[129] *See id.* The foundation of the high-profile court rests on the use of "specially trained high-profile judges." *Id.*

[130] *See id.* at 1340.

[131] *See* Robinson, *supra* note 3, at 1340–41.

[132] *Id.* at 1341.

[133] *Id.*

control in the courtroom in the face of the media.[134] Also, this may decrease the likelihood that those judges will be influenced by media scrutiny, public opinion, or the defendant's celebrity status.[135]

Top officials of the state court system would be responsible for selecting the judge that would adjudicate a particular high-profile case.[136] In making this decision, the officials must determine that the selected judge has no potential conflicts.[137] Furthermore, high-profile judges must not be influenced by pretrial publicity; the officials of the state court system would make certain of this by interviewing judges one-on-one or forcing judges to complete questionnaires.[138]

Robinson also recommends that all high-profile judges participate in a training program geared solely toward the practice of adjudicating high-profile cases.[139] First, judges should receive training in trial procedure; this would require participation in a series of mock trials.[140] These mock trials would be designed to address issues such as determining witness credibility, asking questions to develop facts, and resolving conflicts in evidence.[141] Second, Robinson recommends that high-profile judges receive training in the area of media management.[142] This training would encompass, among other things, methods that would enhance judges' ability to communicate with the media.[143] Because high-profile judges will have to sentence convicted high-profile defendants, Robinson thirdly suggests that judges receive training on uniformity in sentencing to ensure the consistency of punishment in high-profile cases with that of similar non-high-profile criminal adjudications.[144]

Robinson further contends that a defendant's entitlement to a jury trial should be eliminated in high-profile cases involving petty offenses.[145] Instead, a high-profile defendant would have his or her

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[134] *See id.*

[135] *Id.*

[136] Robinson, *supra* note 3, at 1342.

[137] *Id.* Robinson demonstrates this proposal with the following example: "[I]f a certain singer elects to have her case heard by a high-profile judge and the defendant is the judge's favorite musician, the state would be responsible for concluding that the judge has the potential for bias in that case." *Id.*

[138] *Id.*

[139] *Id.* at 1343.

[140] *Id.*

[141] Robinson, *supra* note 3, at 1343.

[142] *Id.*

[143] *Id.*

[144] *Id.* at 1344.

[145] *See id.* at 1344–45.

case heard by a specially trained high-profile judge.[146] Robinson suggests that a judge would have the ability to adjudicate the case more fairly than a jury because the status of the defendant likely would have less influence on a judge.[147] This proposal is constitutionally feasible because the United States Supreme Court has held that crimes categorized as "petty offenses" do not implicate a defendant's Sixth Amendment right to a jury trial.[148]

Robinson also strongly recommends that when high-profile defendants are charged with more serious offenses, they should be given a unilateral right to have their cases heard by a high-profile judge.[149] This right is necessary because, due to pretrial publicity and excessive media coverage during the trial, high-profile defendants are sometimes held to a higher standard in the criminal justice system.[150] Moreover, high-profile cases tend to reverse the roles of the defense and prosecution because the pretrial publicity tends to benefit the prosecution more than the defense.[151] In such cases, the defendant is normally forced to prove his or her innocence, rather than the prosecution having to prove the defendant's guilt, because jurors often predetermine a defendant's guilt before the trial.[152] Because the defendant in a high-profile case will most likely face a biased jury due to extensive pretrial publicity, the defendant should have the right to have his or her case decided by a neutral factfinder so that he or she can obtain a fair trial.[153]

B. *The* Sheppard-Mu'Min *Remedy*

Charles H. Whitebread and Darrell W. Contreras, Professors of Law at the University of Southern California Law School, believe that the best solution to effectively eliminate pretrial prejudice in high-

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[146] Robinson, *supra* note 3, at 1344.

[147] *Id.*

[148] *See* Duncan v. Louisiana, 391 U.S. 145, 159 (1968).

[149] *See* Robinson, *supra* note 3, at 1347.

[150] *See id.* at 1327–28. Robinson explains that high-profile criminal defendants are often held to a higher standard in the criminal justice system because their celebrity status can often subject them to aggressive prosecution. *Id.* Also, when the high-profile defendant is a professional athlete, fame, fortune, and celebrity status impose a heavy burden on athletes to conform to the public's image of "flawless human beings." *Id.* at 1328. Because athletes, in addition to other sorts of celebrities, are considered to be role models for youths, they are sometimes held to a higher standard. *Id.* at 1327–28.

[151] *Id.* at 1348.

[152] *See id.*

[153] *See id.* at 1349.

profile cases is the so-called *Sheppard-Mu'Min* remedy because it "strikes the proper balance between the defendant's interest in a fair trial and the media's interest in informing the public."[154] Using the *Sheppard-Mu'Min* remedy, trial courts impose a gag order on trial participants as soon as the trial proceedings commence and fashion voir dire according to the standard enumerated in *Mu'Min v. Virginia*.[155]

1. Gag Orders on Trial Participants

The first part of the proposed *Sheppard-Mu'Min* remedy involves imposing a gag order on trial participants.[156] Whitebread and Contreras assert that, in high-profile criminal cases, both sides have an incentive to address the public via the media and circulate information that will result in a court victory.[157] Due to these interests, a trial court should impose a gag order restricting the communications of the trial participants immediately after proceedings commence.[158] In effect, this gag order would forbid all parties involved in the case from

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[154] Whitebread & Contreras, *supra* note 14, at 1620. In *Sheppard v. Maxwell*, the United States Supreme Court held that Sheppard was denied his right to a fair trial because of the trial judge's failure to protect him from prejudicial pretrial publicity. Charles H. Whitebread, *Selecting Juries in High Profile Criminal Cases*, 2 GREEN BAG 2D 191, 197 (1999); *see* 384 U.S. 333, 361–63 (1966). The Court said that the trial judge could have mitigated pretrial publicity by prohibiting:

> extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters, such as the refusal of Sheppard to submit to interrogation or take any lie detector tests; any statement made by Sheppard to officials; the identity of prospective witnesses or their probable testimony; any belief in guilt or innocence; or like statements concerning the merits of the case.

Sheppard, 384 U.S. at 361; *see* Whitebread, *supra*, at 197. As noted by Whitebread, in *Mu'Min v. Virginia*, the United States Supreme Court "addressed whether a defendant has a constitutional right to ask content questions during voir dire." Whitebread, *supra*, at 198; *see* 500 U.S. 415, 424–26 (1991). According to Whitebread, the Court held that:

> the Sixth Amendment does not require a judge in a well-publicized case to inquire about the amount and content of the media reports that each potential juror may have observed. Rather, it is sufficient that the trial judge ask potential jurors whether they have formed an opinion because of the reports from outside sources. Unless the adverse publicity and media justify a presumption of prejudice, the juror's declaration of impartiality may be believed.

Whitebread, *supra*, at 198; *see Mu'Min*, 500 U.S. at 424–26.

[155] Whitebread & Contreras, *supra* note 14, at 1620.

[156] *See id.*

[157] *See id.*

[158] *See id.*

discussing any aspect of the case with the media.[159] Also, a gag order would not violate freedom of the press because courts have not interpreted the First Amendment to grant the press a right of free access to trial participants.[160] If the press publishes prejudicial stories, a trial court then can warn those reporters who wrote or broadcasted those stories of "the impropriety of publishing material not introduced in the proceedings."[161]

2. Voir Dire

Once a trial court has imposed a gag order on trial participants, Whitebread and Contreras assert that the trial court would then conduct voir dire—the second and final element of the *Sheppard-Mu'Min* remedy.[162] Whitebread and Contreras stress that a completely untainted jury is not constitutionally required and thus should not be a court's goal.[163] Due to the publicity surrounding a high-profile case, there are few people who have no knowledge of, or have yet to form an opinion about, the case.[164] Therefore, the *Mu'Min* voir dire standards seek jurors who could render an impartial verdict despite information obtained from the media.[165] These standards speed up the voir dire process because they eliminate the need to tirelessly question potential jurors about their exposure to pretrial publicity.[166] According to Whitebread and Contreras, even the most extensive voir dire could not uncover all of the hidden biases found in potential jurors.[167] Instead of conducting a voir dire in the hopes of accomplishing the impossible, they suggest that society should trust that jurors will respond truthfully to the questions asked during voir dire and remain true to their oath of rendering a fair verdict based on the evidence presented at trial.[168]

Whitebread and Contreras also contend that the *Mu'Min* standards of voir dire would eliminate the need to sequester the jury.[169] They argue that society should not concern itself with media reports

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[159] *See id.*
[160] Whitebread & Contreras, *supra* note 14, at 1621.
[161] *Sheppard*, 384 U.S. at 362; *see* Whitebread & Contreras, *supra* note 14, at 1621.
[162] Whitebread & Contreras, *supra* note 14, 1622.
[163] *See id.*
[164] *See id.*
[165] *See id.*
[166] *Id.*
[167] *See* Whitebread & Contreras, *supra* note 14, at 1622–23.
[168] *Id.* at 1623.
[169] *Id.*

jurors may hear if the judge allows them to return to their homes at the end of the court day.[170] Judges should caution the jury, however, that any information they hear outside of the courtroom may indeed be wrong and is not part of the official trial proceedings.[171] Moreover, judges should further remind jurors of their oath to render a verdict based only on the evidence presented in court.[172] Society should then trust jurors to uphold their oath.[173] Whitebread and Contreras believe that trust, as an alternative to sequestration, would not only increase the pool of potential jurors because sequestration would no longer exist, but also would eliminate the severe social burdens imposed on a sequestered jury in a high-profile case.[174]

Whitebread and Contreras present a few remedies that should abate attempts by the media to pressure jurors in high-profile cases.[175] First, a trial court may issue a protective order establishing a buffer zone around a juror's house.[176] Buffer zones have been upheld as constitutional, and they provide a sufficient shield between the jurors and the potential harassers.[177] Second, many states have jury tampering laws that prohibit people from corruptly attempting to influence juror decisions.[178] They stress, however, that this remedy should be coupled with professional restraint exercised by the media.[179] Whitebread and Contreras suggest that the press should direct some effort toward protecting the rights of a defendant to a fair trial by unbiased jurors.[180]

III. Party Anonymity in Civil Trials

The two proposals outlined in Section II are aimed at protecting a high-profile defendant's right to a fair trial in a media-dominated

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[170] *Id.*

[171] *Id.*

[172] Whitebread & Contreras, *supra* note 14, at 1623.

[173] *Id.*

[174] *Id.*

[175] *See id.* at 1624.

[176] *Id.*

[177] *See* Whitebread & Contreras, *supra* note 14, at 1624. In 1994, the United States Supreme Court upheld a court-ordered buffer zone prohibiting protestors from picketing, patrolling, congregating, approaching, or demonstrating within 300 feet of a women's health center. *See* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 759, 776 (1994).

[178] Whitebread & Contreras, *supra* note 14, at 1624. According to Whitebread and Contreras, California is an example of a state that has a statute prohibiting people from attempting to influence a juror's decision. *Id.* at n.219.

[179] *Id.* at 1624.

[180] *Id.*

atmosphere.[181] Robinson's proposal involves the establishment of high-profile courts, whereas Whitebread and Contreras' proposal involves the utilization of gag orders and a specialized type of voir dire.[182] Both proposals go beyond the remedies courts already use to protect the fairness of high-profile trials;[183] nevertheless, other new solutions are needed to adequately defend the rights of the accused. The solution this Note advocates includes permitting high-profile criminal defendants to proceed anonymously throughout their court proceedings.[184] Although anonymity for defendants in criminal proceedings is a rather novel idea, courts have allowed plaintiffs in civil trials to proceed anonymously in certain circumstances for more than two decades.[185]

In civil trials, a plaintiff may keep his identity anonymous throughout the trial despite the Federal Rule of Civil Procedure that requires a plaintiff to disclose his or her name in the instrument commencing a lawsuit.[186] Federal Rule of Civil Procedure 10(a) requires a complaint to "include the names of all the parties."[187] This requirement of disclosure "protects the public's legitimate interest in knowing all of the facts involved" in the case.[188] Public access to this information is more than a customary procedural formality; First Amendment guarantees are implicated when a court decides to restrict public scrutiny of judicial proceedings.[189] Nevertheless, courts will allow plaintiffs to depart from this "procedural custom fraught with constitutional overtones"[190] to accommodate a plaintiff's asserted need to proceed anonymously.[191]

The majority of cases appellate courts have examined regarding party anonymity have historically involved cases where personal pri-

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[181] *See* Robinson, *supra* note 3, at 1339; Whitebread & Contreras, *supra* note 14, at 1588–89.

[182] *See supra* notes 126–180 and accompanying text.

[183] *See supra* notes 126–180 and accompanying text.

[184] *See infra* notes 301–368 and accompanying text.

[185] *See, e.g.*, Roe v. Aware Woman Ctr. for Choice, Inc., 253 F.3d 678, 684–85 (11th Cir. 2001); Doe v. Stegall, 653 F.2d 180, 185 (5th Cir. 1981); S. Methodist Univ. Ass'n of Women Law Students v. Wynne & Jaffe, 599 F.2d 707, 712–13 (5th Cir. 1979).

[186] FED. R. CIV. P. 10(a); *see Aware*, 253 F.3d at 684.

[187] FED. R. CIV. P. 10(a).

[188] Doe v. Frank, 951 F.2d 320, 322 (11th Cir. 1992).

[189] Richmond Newspapers Inc. v. Virginia, 448 U.S. 555, 575–76 (1980); *Stegall*, 653 F.2d at 185.

[190] *Stegall*, 653 F.2d at 185.

[191] *See Aware*, 253 F.3d at 684–85.

vacy issues are the chief concerns.[192] In fact, a number of decisions have pointed to abortions as the "paradigmatic example of the type of highly sensitive and personal matter that warrants a grant of anonymity."[193] In addition to abortion cases, courts have allowed party anonymity in non-abortion related lawsuits as well.[194]

According to the United States Court of Appeals for the Eleventh Circuit, in *Roe v. Aware Woman Center for Choice, Inc.*, in 2001, "parties to a lawsuit must identify themselves in their respective pleadings."[195] Nevertheless, in 1981, in *Doe v. Stegall*, the United States Court of Appeals for the Fifth Circuit stated that "the public right to scrutinize governmental functioning is not so completely impaired by a grant of anonymity to a party as it is by closure of the trial itself."[196] In *Stegall*, the plaintiffs (a mother who brought the suit on behalf of her two minor children) sought to enjoin routine daily religious observances in the county's public schools.[197] There, "[f]earing harassment and violence directed against the Doe family generally and the Doe children in particular should their names be publicly disclosed, the plaintiffs asked that they be permitted to proceed under fictitious names."[198] The court found that "party anonymity does not obstruct the public's view of the issues" involved in a lawsuit or the court's process of resolving the dispute.[199] Moreover, the court stated that the fairness open proceedings protect is not lost when one party is involved in the lawsuit under a fictitious name.[200]

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[192] *See, e.g.*, *Aware*, 253 F.3d at 680–85 (attempting to proceed anonymously in lawsuit where woman alleged injury during course of abortion); *Stegall*, 653 F.2d at 181–82, 186.

[193] *Aware*, 253 F.3d at 685.

[194] *See, e.g.*, James v. Jacobson, 6 F.3d 233, 240–41 (4th Cir. 1993) (holding that identification of parties by their real names in case where plaintiff's children would be affected should yield in deference to sufficiently pressing needs for party anonymity); *Stegall*, 653 F.2d at 186 (allowing anonymity in suit filed on behalf of minors which involved plaintiff's objection to school prayer); *see generally* Doe v. McConn, 489 F. Supp. 76 (S.D. Tex. 1980) (allowing plaintiff to proceed anonymously to protect his transsexuality due to social stigma involved in that area); Doe v. Gillman, 347 F. Supp. 482 (N.D. Iowa 1972) (allowing anonymity in suit challenging state welfare regulations conditioning AFDC assistance on recipients' cooperation with prosecutions of spouses for nonsupport); Doe v. Shapiro, 302 F. Supp. 761 (D. Conn. 1969), *appeal dismissed on other grounds*, 396 U.S. 488 (1970) (allowing anonymity in suit challenging state welfare regulations conditioning assistance payments to illegitimate children on recipient-mother's disclosure of father's identity).

[195] *Aware*, 253 F.3d at 684.

[196] 653 F.2d at 185.

[197] *Id.* at 181–82.

[198] *Id.* at 182.

[199] *Id.* at 185.

[200] *Id.*

Despite the constitutional importance of openness of judicial proceedings, courts have established exceptions to the rule of disclosure to allow a plaintiff to a lawsuit to proceed anonymously.[201] To decide whether to allow a party to proceed anonymously, courts must determine whether the plaintiff has a substantial privacy right that outweighs the constitutional presumption of openness of judicial proceedings.[202] In balancing privacy concerns with the presumption of openness in judicial proceedings, courts give considerable weight to certain factors common to anonymous party suits.[203] These factors include the following: (1) plaintiffs challenging governmental activity; (2) plaintiffs required to disclose information of the utmost intimacy; and (3) plaintiffs compelled to admit their intention to engage in illegal conduct, thereby risking criminal prosecution.[204] The Fifth Circuit in *Stegall* stated that the enumerated factors are not a "rigid, three-step test for the propriety of party anonymity," nor is one factor meant to be dispositive.[205] Along with these specific factors, threats of violence generated by a case, the threat of hostile public reaction to a lawsuit, and the special status and vulnerability of the plaintiffs, when looked at in conjunction with the other three factors, can sometimes "tip the balance against the customary practice of judicial openness."[206] Underlying all three of the involved factors is whether a "plaintiff would be likely to suffer real and serious harm if she was not allowed to use a pseudonym."[207]

Because anonymity is still the exception, the possibility of embarrassment resulting from being a named party to a lawsuit, standing alone, will not permit a party to proceed anonymously.[208] Furthermore, the fact that a suit may "annoy the parties and subject them to possible criticism" is not enough to deprive the judge, the jury, and the public of the right to know the identity of the parties.[209] Overall, trial judges must carefully review all circumstances of a case in deter-

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[201] *See Aware*, 253 F.3d at 685; *Frank*, 951 F.2d at 323.

[202] *Frank*, 951 F.2d at 323 (quoting *Stegall*, 653 F.2d at 186).

[203] *Id.*; *see Stegall*, 653 F.2d at 185–86.

[204] *See Frank*, 951 F.2d at 323; *Stegall*, 653 F.2d at 185–86.

[205] *Stegall*, 653 F.2d at 185.

[206] *Id.* at 186. The Fifth Circuit allowed parties to proceed anonymously because the plaintiffs were children, the plaintiffs made a showing of threatened harm, the plaintiffs pointed to potential serious social ostracization based upon militant religious attitudes, and the case involved the fundamental privateness of religious beliefs. *Id.*

[207] Victoria v. Larpenter, No. 00-T41960, 2001 U.S. Dist. LEXIS 5072, at *5–6 (E.D. La. Apr. 17, 2001).

[208] *Frank*, 951 F.2d at 324; *Victoria*, 2001 U.S. Dist. LEXIS 5072, at *6.

[209] *Stegall*, 653 F.2d at 184.

mining whether a plaintiff's privacy concerns outweigh the general presumption of openness of judicial proceedings.[210]

IV. Ineffectiveness of Current Devices Courts Utilize to Remedy the Effects of Pretrial Publicity on High-Profile Criminal Cases

A. *Gag Orders*

A gag order on trial participants, standing alone, will not adequately protect a high-profile criminal defendant's right to a fair trial.[211] Issuing gag orders without utilizing other devices is problematic because gag orders cannot constitutionally restrict the media's ability to report everything it learns or gathers about the case before or during the trial.[212] In addition, although gag orders restrict the trial participants' ability to talk about the case and thus limit the media's information sources,[213] they are ineffective when utilized by themselves because they do not limit the underlying information to which the press has easy access.[214] For example, gag orders do not restrict the identity of the accused; thus, even with a gag order, the press can conceivably learn of the defendant's identity and then report information about the defendant's role in the crime before the trial begins.[215]

When employed along with other effective remedies, however, a gag order can effectively decrease the amount of prejudicial pretrial publicity that reaches potential jurors.[216] A gag order does not violate freedom of the press because courts have not construed the First Amendment as granting the press a right of free access to trial participants.[217] If reporters publish prejudicial stories about a case, a trial

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[210] *See Frank*, 951 F.2d at 323; *Stegall*, 653 F.2d at 185–86; *S. Methodist*, 599 F.2d at 712–13.

[211] Gag orders have been issued in several high-profile cases in recent years, including O.J. Simpson's civil trial, the Timothy McVeigh case, the Paula Jones sexual harassment case against President Clinton, and a class-action lawsuit against tobacco companies in Florida. Breton, *supra* note 44 at 1A. Despite these gag orders, almost everyone in the country knew about those cases because the press was still able to report everything they learned about the defendants before the respective trials began. *See id.*

[212] *See* Whitebread & Contreras, *supra* note 14, at 1607.

[213] *See* Stephen, *supra* note 29, at 1084–85.

[214] *See id.*

[215] *See* Whitebread & Contreras, *supra* note 14, at 1607–08.

[216] *See* Stephen, *supra* note 29, at 1084.

[217] *See In re* Application of Dow Jones & Co. v. Simon, 842 F.2d 603, 608 (2nd Cir. 1988). To date, only the Second, Fourth, Ninth, and Tenth Circuits have upheld gag or-

court can notify them of the impropriety of publishing material not introduced in the proceedings.[218]

Overall, a "[r]estraint on trial participant speech is effective because, although not directly restraining the media, it severely limits their information sources."[219] With gag orders, "the judge can control the release of information to the press by police officers, witnesses, and the counsel for both sides."[220] Gag orders can decrease the amount of prejudicial pretrial publicity because the judge can order trial participants not to discuss such topics as the refusal of a defendant to submit to a lie detector test; the identity of prospective witnesses or their likely testimony; and any belief in the guilt or innocence of the accused.[221]

B. *Voir Dire*

Despite the noble goals of voir dire, it generally is not an effective way of protecting a high-profile criminal defendant from damaging pretrial publicity.[222] Voir dire, as it is currently used, tries to eliminate the impact of pretrial publicity by selecting jurors who have no knowledge about the case.[223] It is virtually impossible in a high-profile case to find a juror with no knowledge about the case, considering the large amount of pretrial publicity.[224] In fact, jurors in high-profile

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ders as constitutional. Whitebread & Contreras, *supra* note 14, at 1609. Those that have upheld gag orders on the trial participants have applied the less restrictive "reasonable likelihood" standard that requires only that the court evaluate whether it is "reasonably likely that the pretrial publicity will prejudice a fair trial." *Dow Jones*, 842 F.2d at 610; *see* Whitebread & Contreras, *supra* note 14, at 1609 n.141.

[218] CAMPBELL, *supra* note 109, at 131; *see* Sheppard v. Maxwell, 384 U.S. 333, 360, 361 (1966).

[219] Stephen, *supra* note 29, at 1084.

[220] CAMPBELL, *supra* note 109, at 131.

[221] Breton, *supra* note 44, at 1A. In the federal corruption case involving Mayor Cianci mentioned above, the gag order issued prohibited everyone with a connection to the case from talking about:

> the character, credibility, reputation, alleged prior bad acts or criminal record of a party or witness;' the possibility of a guilty plea or any statement given by a defendant; the existence or results . . . of a lie-detector test given to a defendant; the identity, anticipated testimony or credibility of any prospective witnesses; any information given to the grand jury; and the contents of any documents filed under seal or sealed by the court or information about chambers conferences.

Id.

[222] *See* Whitebread & Contreras, *supra* note 14, at 1610–11.

[223] *Id.* at 1610.

[224] *Id.* at 1611.

cases not impacted by pretrial news reports may be "so far removed from the mainstream of American life" that the community views will not be expressed in the courtroom.[225] Voir dire may also locate potential jurors who have not yet formed an opinion about the case.[226] Unfortunately, locating jurors who have not formed an opinion about a case that they have learned about through the press is difficult to achieve in a high-profile case because people naturally respond to events they see unfolding in the news.[227] Moreover, by solely attempting to determine a juror's exposure to the media, voir dire fails to determine the actual existence and degree of any bias engendered by such exposure.[228] An extensive voir dire also typically involves substantial financial costs and thus has the result of burdening taxpayers.[229]

Although the goal of voir dire is to excuse tainted jurors, the possibility exists that some potential jurors will not admit their prejudice.[230] Indeed, during a voir dire examination, jurors sometimes do not give accurate or honest responses.[231] Chief Justice Marshall pointed out that a juror possessing a fixed opinion about the guilt of a defendant might claim to be able to render an impartial verdict, and indeed might be able to, but the law should not rely on those claims.[232] Because jurors who claim in their voir dire examination that

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[225] *Id.*

[226] *See id.*

[227] *See* Whitebread & Contreras, *supra* note 14, at 1611.

[228] Stephen, *supra* note 29, at 1070 n.49; *see also* Newton N. Minow & Fred H. Cate, *Who Is an Impartial Juror in an Age of Mass Media?*, 40 AM. U. L. REV. 631, 649–54 (1991).

[229] *See* Robinson, *supra* note 3, at 1338. Justice Reardon commented that a reading of the fair trial cases does not provide "an adequate description of the endless days spent on voir dire at great private and public expense prior to the commencement of trial where everyone in attendance . . . is wrung dry in interrogations based on possible juror prejudice emanating from dangerous publicity." Paul C. Reardon, *The Fair Trial-Free Press Controversy—Where We Have Been and Where We Should Be Going*, 4 SAN DIEGO L. REV. 255, 264 (1967).

[230] Whitebread & Contreras, *supra* note 14, at 1610.

[231] Robinson, *supra* note 3, at 1335. "Dale W. Broeder, a staff member of the University of Chicago Jury Project, casts some doubts on the efficacy of voir dire. He conducted interviews with 223 jurors and most of the lawyers involved in 23 consecutive trials before a federal district court in the Midwest." Walter Wilcox, *The Jury Trial*, *in* FREE PRESS AND FAIR TRIAL: SOME DIMENSIONS OF THE PROBLEM 77, 88 (Chilton R. Bush ed., 1970). From these interviews, Broeder set out the following points as evident: "(1) *Voir dire* is grossly ineffective as a screening mechanism . . . ; (3) Jurors often, either consciously or unconsciously, lie on *voir dire*; [and] (4) *Voir dire* is utilized much more effectively as a forum for indoctrination than as a means of sifting out potentially unfavorable jurors." *Id.* Walter Wilcox states that these results are persuasive and that perhaps it is "naive to assume that [voir dire] serves to cleanse the mind of the facts or that it can eliminate prejudiced jurors." *Id.*

[232] BUNKER, *supra* note 31, at 42. In *Irvin v. Dowd*, despite extensive voir dire, the force of the continued adverse pretrial publicity about the defendant prejudiced almost every

they can render an impartial verdict most likely will not be able to do so after having already formed an opinion about a high-profile case, an extensive voir dire examination, by itself, will not always result in an impartial jury.[233]

C. *Jury Instructions*

Special jury instructions are ineffective at decreasing the prejudicial effect of pretrial publicity because "it is impractical to believe that jurors disregard information that may be deeply imbedded in their minds."[234] In addition, jury instructions in high-profile criminal cases often do not serve to compel jurors to disregard an individual's celebrity status because it is extremely difficult for jurors to think of a celebrity as a regular person.[235]

In a survey of approximately 500 judges, only 32.9 percent believed that jury instructions were "highly effective" in ensuring impartiality in the jury's decision-making process.[236] On the other hand, 40.5 percent found jury instructions to be "moderately effective" and

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potential juror in the county where the trial was going to be held. 366 U.S. 717, 726 (1961). Of the jurors finally impaneled, eight of the twelve had already formed an opinion that the defendant was guilty. *Id.* at 727. From this statistic Justice Clark concluded:

> With such an opinion permeating their minds, it would be difficult to say that each could exclude this preconception of guilt from his deliberations. The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man. . . . [W]e can only say that in the light of the circumstances here the finding of impartiality does not meet constitutional standards.

Id. at 727–28. Clark continued, "No doubt each juror was sincere when he said that he would be fair and impartial," but he notes, "[w]here so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight." *Id.* at 728. The *Irvin* Court suggested that prolonged and extensive pretrial publicity may constitute evidence that the judgment of the jury panel has been so adversely impacted to the point that the credibility of all potential jurors' truthful assertions of impartiality is undermined. CAMPBELL, *supra* note 109, at 100.

[233] *See* BUNKER, *supra* note 31, at 42.

[234] Robinson, *supra* note 3, at 1336.

[235] *See id.* at 1336 n.169. Robinson points out that in the 1997 Bill Cosby extortion trial, in which Autumn Jackson was the defendant, the judge read to the jury ninety minutes' worth of jury instructions. *Id.* The judge basically told the jury that it makes no difference whether the defendant was television icon Bill Cosby's daughter. *Id.* Robinson contends that the jurors in the Cosby case could not possibly disregard the defendant's father's celebrity status or the pretrial publicity surrounding the case just because the judge told them to do so in the jury instructions. *Id.*

[236] Fred S. Siebert, *Trial Judges' Opinions on Prejudicial Publicity*, *in* FREE PRESS AND FAIR TRIAL: SOME DIMENSIONS OF THE PROBLEM 1, 12 (Chilton R. Bush ed., 1970).

13.2 percent found them to be "ineffective."[237] From this data, one commentator suggests that "[a]pparently some judges are not sure that their instructions not to read or listen to news reports of the trial are always followed by members of the jury."[238] In addition, as to the effects of jury instructions, one judge surveyed commented, "A juror's mind can no more be cleansed of information than a bell can be unrung."[239]

D. *Sequestration*

Although sequestration seems like an excellent solution to protect a high-profile criminal defendant's right to a fair trial on its face, this remedy has many deficiencies.[240] Because of its high social and financial costs, sequestration is highly impractical in preventing media publicity from adversely affecting the required impartiality of the jury in a high-profile case.[241] Indeed, sequestering a jury is ineffective at minimizing the effects of excessive media coverage on a high-profile criminal trial because sequestration comes too late in the process.[242] By the time jurors are impaneled, most of them have already been swayed by pretrial media reports.[243] Although sequestration protects the jury from the influence of media reports during the trial, it does not correct any pretrial prejudice.[244] For example, one commentator points out that the Juan Corona murder case drew extensive media attention in the pretrial stage—the media constantly described the recovery of the bodies in detail, and Corona's guilt had already been decided in the court of public opinion.[245]

Moreover, sequestration is "a major inconvenience for the impaneled jurors who may then prejudice the result in the trial by blaming the defendant for this disruption of their lives."[246] Indeed, defendants often do not exhibit characteristics that "make them seem worthy of a citizen's sacrifice" of sequestration.[247] In fact, sequestration is so unpopular with jurors that courts often withhold from jurors

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[237] *Id.*
[238] *Id.*
[239] *Id.*
[240] *See* Robinson, *supra* note 3, at 1338.
[241] *See id.*
[242] *See id.* at 1336.
[243] *See id.*
[244] *See* Whitebread & Contreras, *supra* note 14, at 1612.
[245] GERALD, *supra* note 95, at 80.
[246] KANE, *supra* note 7, at 65.
[247] GERALD, *supra* note 95, at 81.

the identity of attorneys who move for it.[248] The large amount of security measures imposed on jurors also creates resentment among them.[249]

In addition, the financial costs of sequestering a jury are an enormous burden on the tax-paying community because high-profile trials typically continue for long periods of time.[250] When a jury is sequestered, the monetary costs include room, board, and entertainment of the jurors; in a lengthy trial, these costs can be enormous.[251] In regard to the social costs, sequestration may decrease the number of people willing to serve on juries because people do not want to be separated from their families and friends for any considerable amount of time.[252] Furthermore, a lengthy sequestration may decrease the chances for a fair trial because jurors may rush through their deliberations to return to their everyday lives.[253] Sequestration also means that persons of "professional status or business responsibility usually cannot give time to jury duty."[254] Because the benefits of sequestration are often heavily outweighed by the fiscal and social burdens associated with it, it is not an effective or efficient remedy available to courts.[255]

E. *Postponement*

Despite its attractiveness as a remedy, postponement does not effectively diminish the effects of pretrial publicity on a high-profile criminal case.[256] Potential jurors are not likely to forget everything they heard in the news before the original trial date merely because

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[248] *Id.*

[249] *Id.*

[250] *See id.*; Robinson, *supra* note 3, at 1338. At the close of a high-profile case, taxpayers can expect to pay thousands, or even millions of dollars. Robinson points out that Mike Tyson's rape trial cost Indiana taxpayers approximately $100,000, and O.J. Simpson's criminal trial cost California taxpayers about $9 million. Robinson, *supra* note 3, at 1338.

[251] Whitebread & Contreras, *supra* note 14, at 1612. Indeed, in *Sheppard*, Justice Clark thought that ordering the jurors to avoid all contact with news media reports would have been a less drastic step than sequestration. KANE, *supra* note 7, at 21.

[252] *See* Whitebread & Contreras, *supra* note 14, at 1613.

[253] *See id.*

[254] GERALD, *supra* note 95, at 81.

[255] *See* Whitebread & Contreras, *supra* note 14, at 1615.

[256] *See id.* at 1618. In a survey of approximately 400 judges, 12.2 percent found postponement to be "highly effective," 30.4 percent found it to be "moderately effective," and 9.3 percent found it to be "ineffective." Siebert, *supra* note 236, at 13.

the trial is moved to a future time.[257] Postponement is also ineffective because no guarantee exists that media interest in the case will fade over time.[258] Even if media attention does fade, it may resurge once the trial eventually takes place.[259] Postponement may also diminish the accuracy and reliability of a witness's testimony because a person's memory often fades over time.[260] In addition, postponement inevitably results in a backlog of the docket in the case's jurisdiction.[261]

Postponement of a trial may also negatively impact a high-profile defendant's Sixth Amendment rights.[262] In 1968, shortly after the *Sheppard* case, the Committee on the Operation of the Jury System in the United States Judicial Conference, composed of federal judges, issued a report stating that federal courts should make more use of the traditional methods of ensuring an impartial jury.[263] Although the committee advocated the use of postponement, it noted that postponement often involves substantial complications, namely "prejudice to the right of a defendant to a speedy trial and the interest of the public in the prompt administration of justice."[264] Because of its adverse effects on the Sixth Amendment guarantee of a speedy trial, Judge Eric Younger asserts:

> [C]ontinuances . . . [are] probably the most universally agreed-upon villain of the court administrative process, and one which, especially without the consent of the defendant, is expressly forbidden by statute in many states and, now in the federal system as well. The last measure which a legal system conscious of its image needs is to attempt to create fair-

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[257] *See* Whitebread & Contreras, *supra* note 14, at 1618. Whitebread and Contreras also point out that psychologists are skeptical that time erodes the harmful effects of pretrial publicity. *Id.*

[258] *See id.*

[259] *Id.* Whitebread and Contreras state that the O.J. Simpson case demonstrates that a delay in proceedings in a case with national attention will not decrease the interest in the case. *Id.* In October of 1995, the Simpson case was the top news story, receiving about twenty-six hours of coverage on the evening news. *Id.* at 1619.

[260] *Id.* at 1618.

[261] *Id.* at 1619. Whitebread and Contreras argue that in jurisdictions such as Los Angeles, where most high-profile cases arguably take place, any additional backlog to an already crowded court system could prove disastrous. *Id.*

[262] *See* BUNKER, *supra* note 31, at 63.

[263] Report of the Judicial Conference Committee, *supra* note 17, at 412; *see* BUNKER, *supra* note 31, at 62.

[264] Report of the Judicial Conference Committee, *supra* note 17, at 413; *see* BUNKER, *supra* note 31, at 63.

> ness in its most celebrated cases by keeping them around for long periods of time.[265]

Whitebread and Contreras point out that the United States Supreme Court has not yet addressed whether postponement of a trial violates a defendant's Sixth Amendment right to a speedy trial.[266] Further, Whitebread and Contreras state that if a defendant moves for and is granted a continuance, it would seem unconscionable to permit the defendant to later succeed on a claim that the continuance violated his or her right to a speedy trial.[267] Without a clear statement from the Court, a defendant's request for a continuance may act as a waiver of the Sixth Amendment right to a speedy trial.[268]

F. *Change of Venue*

Although moving a trial to a place where the publicity is not as great seems like an ideal way to impanel jurors that lack exposure to prejudicial pretrial publicity, the value of a venue change as a remedy has diminished due to technological advances.[269] Because the trial is moved to a venue outside of the scope of publicity to locate unbiased jurors, this option is only available if the impact of a case is confined to a local area.[270] Nonetheless, the current ability of the media to instantaneously reach a vast number of people with one telecast has decreased the chances of finding unbiased jurors in any alternate locale.[271] In high-profile cases, this problem is exacerbated because

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[265] Eric E. Younger, *The* "Sheppard" *Mandate Today: A Trial Judge's Perspective*, 56 NEB. L. REV. 1, 9 (1977).

[266] Whitebread & Contreras, *supra* note 14, at 1606.

[267] *Id.*

[268] *Id.*

[269] *Id.* at 1615.

[270] *Id.* Even if other localities are available for a venue change, lawyers usually do not want a venue change. Gabrielle Crist, *Opal News May Make Jury Selection Difficult*, FORT WORTH STAR-TELEGRAM, Mar. 11, 2000, at 1. *Fort Worth Star-Telegram* Staff Writer Gabrielle Crist writes, "There are three words that most attorneys hate: change of venue." *Id.* In a Texas criminal case where the defendant was accused of the abduction of a six-year-old girl near her home, the media coverage surrounding the case was rather extensive. *Id.* There, one of the prosecutors in the case said that he did not want to ask for a venue change because he wanted the trial to take place where the girl was kidnapped. *Id.* Only if it became too obvious that too many of the potential jurors already formed an opinion about the guilt of the accused would the prosecution even *consider* a venue change. *Id.*

[271] Siebert, *supra* note 236, at 10; Whitebread & Contreras, *supra* note 14, at 1615. In a survey of approximately 400 judges, only 12.2 percent found a change of venue to be a highly effective remedy. Siebert, *supra* note 236, at 10. From this data, a number of judges concluded that a change of venue was not a complete answer to the situation in which a

those types of cases often receive nationwide media attention.[272] Indeed, in particularly notorious cases, a venue change may be of little help because of inflamed passions surrounding the case: anything less than an indefinite delay may be inadequate.[273] In those situations, pretrial publicity will eventually reach potential jurors in every location suitable for a venue change.[274]

Moreover, venue changes in federal court cases are extremely costly and highly inefficient.[275] Under a 1990 federal victim's rights law, the Justice Department must accommodate the needs of victims, including transportation, housing, and food throughout the course of the trial, thus making sequestration fiscally burdensome on the taxpayers.[276] Indeed, many judges resist venue changes because of the expense.[277] Judges also oppose venue changes because moving the trial to another location moves the expense of the trial to the host location.[278]

V. Evaluation of New Proposals by Scholars to Remedy the Prejudicial Effects of Intense Media Coverage in High-Profile Cases

As Section IV demonstrates, traditional methods to prevent pretrial publicity from interfering with the defendant's right to a fair trial

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defendant has been given a high degree of publicity. *Id.* Siebert also asserts that the fact that most mass media communications today tend to saturate an entire state most likely influenced the judges' opinions about venue changes. *Id.*

[272] *See* Whitebread & Contreras, *supra* note 14, at 1615. Whitebread and Contreras point out that in the Rodney King trial, the trial judge changed the venue to Simi Valley, some thirty miles away from Los Angeles, where the beating occurred. *Id.* In that case, media attention was nationwide, so the likelihood of impaneling an impartial jury under those circumstances in any jurisdiction in the country was doubtful. *Id.* In addition, a venue change to a place only thirty miles away cost the county over $200,000. *Id.*

[273] Kane, *supra* note 7, at 4. Peter Kane states that a good example of this is the John Hinckley, Jr. trial for shooting Ronald Reagan. *Id.* An assassination attempt on the President of the United States is a notorious act that is sure to receive the widest publicity. *Id.* Because the shooting was caught on videotape, those scenes were shown over and over again in slow motion in virtually every television outlet in the country. *Id.* Kane asserts that it would be impossible to select twelve impartial jurors who had not seen the attack on television. *Id.*

[274] *See id.*; Whitebread & Contreras, *supra* note 14, at 1615.

[275] *See* Whitebread & Contreras, *supra* note 14, at 1617.

[276] *See id.*

[277] Gerald, *supra* note 95, at 76.

[278] *Id.* For example, the trial of Joseph Remiro for the murder of the Oakland superintendent of schools cost Contra Costa County, the location to which the trial was moved, about $500,000. *Id.* In fact, at least seventeen states restrict venue changes in part because of the expense to the host county. *Id.* at 77.

are ineffective.[279] Although scholars have suggested alternatives to the traditional methods, those alternatives also fail to effectively address the fairness concerns at issue here.[280] As mentioned above, Robinson asserts that the creation of high-profile courts would help to correct the problems of excessive media coverage in high-profile cases.[281] In evaluating the effectiveness of the establishment of high-profile courts in the future, the practical ramifications of actually implementing Robinson's remedy are of the utmost concern.

Robinson's proposal, if implemented, would result in several major problems. First, the creation of another court system and the training of judges would place financial burdens on both taxpayers and states.[282] Training judges in the area of high-profile cases would also involve substantial monetary costs.[283] Second, Robinson's solution does not provide for a defendant to have a jury trial because, if a defendant chooses to have his case heard in a high-profile court, the case would be adjudicated by a specially trained judge rather than by a jury.[284] Hence, if a defendant wanted to have his case heard by a jury, then he would have go to a regular court and face fairness problems.[285] Another problem with her solution is that if judges must have experience in high-profile cases to receive an appointment to a high-profile court, it soon would be impossible to choose judges with high-profile experience to sit on the court if no one outside the high-profile system hears high-profile cases.[286] Thus, at some future time, inexperienced judges would have to hear high-profile cases, which is exactly the problem Robinson wants to avoid by establishing these specialized courts.[287] Yet another problem with Robinson's proposal is that it would be financially and temporally difficult to set up a process whereby someone determines which cases should be classified as "high-profile" and thus be eligible for adjudication in a high-profile court.[288] Most importantly, Robinson's solution is not very helpful be-

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[279] *See supra* notes 211–278 and accompanying text.
[280] *See infra* notes 281–300 and accompanying text.
[281] *See* Robinson, *supra* note 3, at 1339, 1340.
[282] *See id.*
[283] *See id.* at 1340, 1342–43.
[284] *See id.* at 1344, 1345.
[285] *See id.* at 1348.
[286] *See* Robinson, *supra* note 3, at 1340.
[287] *See id.*
[288] *See id.* at 1339.

cause it does not attempt to correct the problems inherent in the present court system: it merely attempts to ignore them.[289]

As stated previously, Whitebread and Contreras argue that the *Sheppard-Mu'Min* remedy strikes a proper balance between the defendant's interest in a fair trial and the media's interest in informing the public.[290] Under the remedy, trial courts impose a gag order on trial participants and conduct voir dire according to the standards set in *Mu'Min v. Virginia*.[291] Whitebread and Contreras' proposed solution has the potential to effectively curb prejudicial publicity from interfering with a high-profile defendant's right to a fair trial.[292] With the *Sheppard-Mu'Min* remedy, Whitebread and Contreras acknowledge the impossibility of impaneling a perfect jury and attempt to decrease the harm associated with potential jurors' exposure to prejudicial publicity.[293] Unlike Robinson, Whitebread and Contreras suggest a remedy that not only keeps high-profile cases in the current criminal justice system but also eliminates the old remedies that have proven to be both ineffective and expensive.[294]

Although the *Sheppard-Mu'Min* solution has the potential for success, that remedy standing alone most likely will not adequately protect a high-profile criminal defendant's right to a fair trial because pretrial publicity will inevitably still negatively influence some impaneled jurors despite gag orders on trial participants and the *Mu'Min* voir dire.[295] First, gag orders are ineffective at preventing pretrial publicity from reaching potential jurors because, although they do limit some of the media's information sources (namely, what trial participants tell the media), gag orders do not restrict any of the underlying information available to the press.[296] Most importantly, gag orders are problematic because they do not, by themselves, keep the identity of the defendant hidden from the public. With the *Mu'Min* style of voir dire, too much trust is put into the jury rendering an impartial verdict despite being exposed to extensive pretrial publicity about the case.[297] Just because jurors swear to decide a case based on the facts in front of them does not mean that they will automatically cast aside any

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[289] *See id.*

[290] Whitebread & Contreras, *supra* note 14, at 1626.

[291] *Id.* at 1620.

[292] *See id.* at 1621.

[293] *See id.* at 1589.

[294] *See id.* at 1625–26.

[295] Whitebread & Contreras, *supra* note 14, at 1625–26.

[296] *See supra* notes 211–215 and accompanying text.

[297] *See supra* notes 230–233 and accompanying text.

opinion they may have formed about the guilt or innocence of the accused prior to the trial.[298] As Justice Tom Clark stated:

> The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man. . . . No doubt each juror [is] sincere when he [says] that he [will] be fair and impartial . . . [but] such a statement of impartiality can be given little weight.[299]

Justice Felix Frankfurter similarly wrote, "How can fallible men and women reach a disinterested verdict based exclusively on what they heard in court when, before they entered the jury box, their minds were saturated by press and radio for months preceding by matter designed to establish the guilt of the accused."[300]

VI. Applying Party Anonymity in Criminal Trials to Protect the Rights of High-Profile Criminal Defendants

Although the *Sheppard-Mu'Min* remedy has the potential to protect effectively a high-profile defendant's rights if applied properly by trial courts,[301] trial judges must do more than just impose gag orders and conduct voir dire in a different manner to rectify the pretrial publicity problem in high-profile criminal trials. The *Sheppard-Mu'Min* remedy alone will not correct the enormous impact that prejudicial pretrial publicity has on jurors in high-profile criminal cases.[302] Thus, courts must take an extra step to ensure that any pretrial news reports about the case will not negatively influence potential jurors and any pretrial publicity that has made its way into jurors minds will not impact their decisionmaking.[303] That necessary extra step involves allowing a high-profile criminal defendant to proceed anonymously throughout the court proceedings.[304] A high-profile criminal defen-

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[298] *See* Irvin v. Dowd, 366 U.S. 717, 727–28 (1961).

[299] *Id.*

[300] *Id.* at 729–30 (Frankfurter, J., concurring).

[301] *See* Whitebread & Contreras, *supra* note 14, at 1625–26.

[302] *See id.*

[303] *See* Bunker, *supra* note 31, at 144.

[304] *See infra* notes 305–368 and accompanying text. Anonymity has been suggested in criminal rape cases. David Calvert-Smith, Director of Pubic Prosecutions in Great Britain, backed a reform of the rape trial process to give defendants anonymity. Steve Atkinson, *Chief Backs Rape Case Anonymity*, The Mirror, Jan. 12, 2001, at 2. Smith contends that the names of those accused of rape and child abuse should be kept secret until a case against them has been proved. *Id.* According to Atkinson, "Keeping names secret would protect

dant could move to proceed anonymously during the preliminary hearing, the stage when defendants typically request other measures such as venue changes, prior restraints, and gag orders.[305] If an appellate court finds that a judge incorrectly denied a motion for anonymity, the only way for an appellate court to correct such an error is to remand the case for a new trial.[306]

One benefit in allowing a high-profile criminal defendant to proceed anonymously is that anonymity, unlike the gag orders in the *Sheppard-Mu'Min* remedy, can prevent prejudicial pretrial publicity about the defendant from negatively influencing potential jurors.[307] If a judge agrees to conceal the defendant's identity before jury selection, the negative impact of the media's coverage on potential jurors will be severely limited because the defendant's name will not be revealed in any court documents or in any public record.[308] This means that the press will not have access to the defendant's identity to subsequently use in pretrial news reports.[309] Without the ability to report the high-profile defendant's name in any pretrial news reports, the potential for media coverage to cause juror bias will decrease because the jury pool will most likely never learn the defendant's name in connection with the case before the trial.[310] In addition, the media

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high profile targets such as singer Mick Hucknall and former Southampton football club manager David Jones." *Id.*

[305] *See, e.g.*, Neb. Press Ass'n v. Stuart, 427 U.S. 539, 587–88 (1976) (approving implicitly request for prior restraint in preliminary hearing). If appropriate measures are taken later than this point, the pretrial publicity may be so great that no remedy would make a difference in the fairness of the trial. For example, in the O.J. Simpson case, up until three weeks before the trial, a gag order still had not been issued. Judge Ito's plan to impose a gag order at that time was revealed by the media. *See* PAUL THALER, THE SPECTACLE: MEDIA AND THE MAKING OF THE O.J. SIMPSON STORY 87–88 (1997). Although Ito did impose a gag order shortly thereafter, the amount of pretrial publicity was already so great that the order could not undo the damage that had been done in prejudicing potential jurors. *See id.*

[306] *See* Sheppard v. Maxwell, 384 U.S. 333, 361–63 (1966). The Court stated, "[i]f publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered." *Id.* at 363. In holding that the trial court did not adequately protect the defendant's right to a fair trial, the Supreme Court remanded the case to the District Court with instructions to release Sheppard from custody unless the State prosecuted him again within a reasonable time. *Id.*

[307] *See* BUNKER, *supra* note 31, at 144.

[308] *See* Doe v. Stegall, 653 F.2d 180, 185 (5th Cir. 1981).

[309] *See id.*

[310] *See id.* Obviously in high-profile cases that are high-profile due to the notoriety of the crime itself and not necessarily because of the celebrity status of the defendant, the media could determine the name of the defendant based on the facts of the case, the victim, the location, and possible suspects. Thus, benefits of anonymity during the pretrial stage in heinous crimes, in which the press probably does not even care about the name of

will lack the ability to connect the high-profile defendant to any prejudicial information in the defendant's background that the press could have found and reported had the court not permitted the defendant to proceed anonymously.[311] Eliminating the possibility that the press will report prejudicial information about a high-profile criminal defendant's background prior to the trial could significantly reduce the likelihood of impaneling a jury with preexisting opinions of the defendant's guilt or innocence.[312] Any reduction of the likelihood of impaneling a biased jury certainly increases the chances that a high-profile criminal defendant will receive a fair trial.[313] If, after anonymity is granted, someone reveals the name of the defendant, judges have several remedies available to them. If disclosure happens before or during a trial, a judge could hold the person who revealed the defendant's identity in contempt of court.[314] If the defendant's identity is revealed in the courtroom while the jurors are present, contempt is still an option, but a more appropriate remedy would be a mistrial, if the judge thought the violation serious enough to negatively impact the accused's right to a fair trial.

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the defendant, are speculative at best. Anonymity is therefore at its most effective when a case is high profile because of the celebrity status of the defendant rather than the heinous nature of the crime. Some celebrities fall into two or more categories, such as O.J. Simpson, because of the heinousness of the crime and because the defendant is well known. The lines between the categories are not always clear, and defendants will have to decide for themselves if anonymity would work in their particular circumstances.

[311] If the court had permitted the suspect in *Mu'Min* to remain anonymous, the detailed reporting of suspect's background which showed that suspect was fully capable of committing murder would have been avoided. The reports about suspect's background included details of the suspect's juvenile record, prior murder of a cab driver, history of prison problems and parole denials, habit of going on numerous criminal forays before murdering the victim, and fellow inmates' description of the suspect as a "lustful" individual who did "strange stuff." Mu'Min v. Virginia, 500 U.S. 415, 436–37 (1991) (Marshall, J., dissenting). Moreover, had the press in *Sheppard* not known the defendant's identity, headlines that were printed such as "Why Isn't Sam Shepard in Jail?" would have been impossible to run. *See Sheppard*, 384 U.S. at 341. In the Manson murder case the *Los Angeles Times* ran a large-type banner headline that said, "MANSON GUILTY NIXON DECLARES." KANE, *supra* note 7, at 30. Potential jurors who read about the President declaring the accused guilty as charged would most likely have a difficult time forgetting it once the defendant's identity as "Manson" was announced. *See id.*

[312] *See generally Mu'Min*, 500 U.S. at 443–48 (Marshall, J., dissenting).

[313] *See generally* Whitebread & Contreras, *supra* note 14, at 1588–89.

[314] In the federal corruption case involving Mayor Cianci, United States District Court Judge Ernest C. Torres said that people caught violating the issued gag order could be held in contempt of court. Breton, *supra* note 44, at 1A. Just as contempt is used as a remedy if someone violates a gag order before the trial begins, it can also be used to punish a violator of an anonymity order. *See id.*

Another benefit of allowing a high-profile criminal defendant to proceed anonymously is that, regardless of how the judge conducts voir dire, any pretrial publicity that influenced a potential juror prior to the point where the court grants anonymity will most likely not impact the fairness of the trial.[315] If a defendant's identity is not revealed during the trial, a juror is probably not going to remember the defendant's name in connection with negative information reported by the press just from the facts of the case.[316] In cases that are high profile due to the defendant's celebrity status, such as the O.J. Simpson case, allowing the defendant to proceed anonymously, by itself, will not protect the trial's fairness because concealing a defendant's name will not conceal a face.[317] If a juror can recognize the defendant based on his appearance alone, then any biases he or she may have about the case will surface because the juror will have the ability to connect those preexisting biases upon seeing the defendant.[318] In situations

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[315] *See infra* notes 316–320 and accompanying text.

[316] In the murder trial of Diane Zamora, a formal Naval Academy midshipman accused of abducting and murdering a girl with whom her boyfriend had had an affair, attorneys worried that publicity would keep them from finding an impartial jury. Crist, *supra* note 270, at 1. There, "many of the potential jurors had seen media reports about the case, but they did not remember the specifics of the case." *Id.* The assistant district attorney in the Zamora case stated, "I think they [the potential jurors] hear it, but they don't file it away." *Id.*

Some cases are so notorious that the facts alone, not the defendant's identity, is what prejudices the jury. In those cases, allowing a defendant to proceed anonymously would not help to deflect any negative information about the case reported by the media prior to or during the trial. The recent case about the mother who drowned her five children is a good example—even if Andrea Yates' identity was concealed throughout the trial, the facts alone would be enough to trigger a juror's memory about information he or she had heard before or during the trial. *See, e.g.*, CNN, *Officer Says Yates Led Him to Her Dead Children* (Mar. 11, 2002), *at* http://www.cnn.com/2002.LAW/02/28/yates.trial/index.html. Thus, in the Yates trial, anonymity would not be an effective remedy for pretrial publicity. *See id.*

[317] *See* Ann Burnett, *Jury Decision-Making Processes in the O.J Simpson Criminal and Civil Trials*, *in* THE O.J. SIMPSON TRIALS: RHETORIC, MEDIA, AND THE LAW 122, 131 (Janice Schuetz & Lin S. Lilley eds., 1999). Burnett states that "in the criminal trial some indication exists that Simpson's celebrity status was difficult for some jurors to get past." *Id.* In fact, in a post interview, one juror asked, "How could a man with everything commit murder?" *Id.*

[318] *See* Ann M. Gill, *Race and Money Matter: Justice on Trial*, *in* THE O.J. SIMPSON TRIALS: RHETORIC, MEDIA, AND THE LAW 139, 140 (Janice Schuetz & Lin S. Lilley eds., 1999). In the context of the O.J. trial, Gill states "[T]he defendant's celebrity status had a major influence on the criminal trial. The trial started later than any other activity in the Los Angeles courthouse because, as Judge Lance Ito noted, 'When O.J. Simpson comes into the building, everything stops.'" *Id.* In instances such as the O.J. case, if "everything stops" when a celebrity walks into the courtroom, it is difficult to see how a juror could make a

such as those, where a defendant is so recognizable that anonymity will not help him or her, the only way for the defendant to be totally protected is to waive his or her right to be present at the trial.[319] If a highly recognizable celebrity defendant waives his or her right to be present at the trial and can proceed anonymously, the jurors will lack the ability to connect any early prejudicial media reports detailing the specific defendant's background or declaring the particular defendant's guilt or innocence with the case in front of them.[320]

Although anonymity for high-profile criminal defendants is a new idea, courts have permitted plaintiffs in civil trials to proceed anonymously in certain circumstances for more than two decades.[321] The ultimate test for allowing a plaintiff in a civil trial to remain anonymous involves determining whether the plaintiff has a substantial privacy right that outweighs the "'customary and constitutionally embedded presumption of openness in judicial proceedings.'"[322] Certainly, a high-profile criminal defendant has an important constitutional right that needs protection by the courts—the Sixth Amendment right to a fair trial.[323] To adequately protect a high-profile criminal defendant's Sixth Amendment right to a fair trial, courts should permit a defendant to proceed anonymously throughout the judicial proceedings.[324]

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decision based on the evidence presented in the case rather than on the information reported by the media prior to the trial. *See id.*

[319] When a criminal defendant receives notice of the date of the trial and nonetheless fails to appear, it is not sufficient, as a matter of law, for the trial to go on without the defendant's presence. WARREN FREEDMAN, THE CONSTITUTIONAL RIGHT TO A SPEEDY AND FAIR CRIMINAL TRIAL 14 (1989); *see* People v. Parker, 440 N.E.2d 1313, 1317 (N.Y. 1982). Because the constitutional right of a defendant to be present at his own trial is fundamental, the validity of a waiver of that right hinges on a showing that the defendant was informed of the nature of the right to be present at trial as well as the consequences of failing to appear at trial, including the fact that the trial will be held without his presence. *Id.*

[320] Some studies indicate that one person's perception of another is "heavily conditioned by his attitudinal set (prejudices)." Wilcox, *supra* note 231, at 74, 89. Upon confrontation with a defendant, the defendant's appearance, sex, age, race, and other factors (possibly recognizing the defendant as a celebrity) have been shown to have a major effect on the jury's existing hostility or sympathy towards the defendant. *Id.* The effect of face-to-face confrontation can modify the impression of the defendant acquired from pretrial publicity—this effect is mainly in the affective component of attitude ("Could this [celebrity] possible commit such a crime?"). *Id.* at 90.

[321] *See, e.g.*, Roe v. Aware Woman Ctr. for Choice, Inc., 253 F.3d 678, 684–85 (11th Cir. 2001); *Stegall*, 653 F.2d at 185; S. Methodist Univ. Ass'n of Women Law Students v. Wynne & Jaffe, 599 F.2d 707, 712–13 (5th Cir. 1979).

[322] Doe v. Frank, 951 F.2d 320, 323 (11th Cir. 1992) (quoting *Stegall*, 653 F.2d at 186).

[323] *See* U.S. CONST. amend. VI.

[324] *See* BUNKER, *supra* note 31, at 144.

Although the First Amendment guarantee of freedom of the press is implicated when a court decides to restrict public scrutiny of judicial proceedings, courts have allowed party anonymity in civil trials despite this constitutional concern.[325] The United States Court of Appeals for the Fifth Circuit has stated that the "public's right to scrutinize public proceedings is not so completely impaired by a grant of anonymity to a party as it is by closure of the trial itself."[326] The public's right to scrutinize public proceedings is not entirely damaged with party anonymity because it does not obstruct the public's view of the issues involved in a lawsuit or of the court's process of resolving the dispute.[327] In a high-profile criminal case, even if the trial court allows the concealment of the defendant's identity, the public and the media can still attend the trial and look at the public record documenting the trial without impediment.[328] Thus, with anonymity, both regular citizens and the press will have the ability to scrutinize the judicial process involved in the case, which is what the Fifth Circuit has said the First Amendment protects.[329]

In deciding whether to allow a party to proceed anonymously in a civil trial, courts balance the plaintiff's substantial privacy right with the presumption of openness in judicial proceedings.[330] To determine whether a plaintiff's privacy right will outweigh the presumption of openness in judicial proceedings, the court looks at the following non-dispositive factors in the balancing test: a challenge to government activity; disclosure of information of the utmost intimacy; and the potential for admission of the plaintiff's intention to engage in illegal conduct, thereby risking criminal conduct.[331] In addition to these factors, threats of violence generated by a case, the threat of hostile public reaction to a lawsuit, and the "special status and vulnerability" of the plaintiffs can sometimes "tip the balance against the customary practice of judicial openness."[332]

Without question, high-profile criminal defendants, like plaintiffs in civil trials, have substantial privacy rights that, at times, should out-

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[325] *See, e.g.*, *Stegall*, 653 F.2d at 185; Victoria v. Larpenter, No. 00-T41960, 2001 U.S. Dist. LEXIS 5072, at *4–6 (E.D. La. Apr. 17, 2001).

[326] *Stegall*, 653 F.2d at 185.

[327] *See id.*

[328] *See id.*

[329] *See id.*

[330] *See Aware*, 253 F.3d at 685; *Frank*, 951 F.2d at 323.

[331] *See Frank*, 951 F.2d at 323; *Stegall*, 653 F.2d at 185–86.

[332] *Stegall*, 653 F.2d at 186; *see Frank*, 951 F.2d at 323.

weigh the presumption of openness in judicial proceedings.[333] In applying this balancing test in a high-profile criminal case, if a defendant is not allowed to proceed anonymously, the press will often decide to report background information about the defendant that is very intimate in nature.[334] For example, reports about a high-profile criminal defendant's juvenile record, past criminal behavior, sensitive medical information, or past sexual activity in relation to the case would certainly result in the disclosure of intimate information that a defendant would not want revealed to the entire public.[335] Furthermore, it would not be uncommon for the public to have a hostile reaction to a high-profile criminal case, especially one in which the defendant is accused of a particularly heinous crime.[336] It would also not be unlikely for a high-profile criminal defendant accused of an egregious crime to be threatened with violence from members of the public, outraged by the defendant's alleged criminal behavior.[337] In addition, even if the high-profile defendant is not accused of an egregious crime, high-profile criminal defendants, especially celebrities and professional athletes, are sometimes held to a higher standard of conduct than average members of the public.[338] Thus, those high-profile criminal defendants, because of their status as celebrities, have a vulnerability to aggressive prosecution not shared by non-celebrity

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[333] *See Aware*, 253 F.3d at 685; *Frank*, 951 F.2d at 323; *S. Methodist*, 599 F.2d at 712–13.

[334] *See, e.g.*, *Mu'Min*, 500 U.S. at 435–37 (Marshall, J., dissenting); *Sheppard*, 384 U.S. at 340–41.

[335] *See, e.g.*, *Mu'Min*, 500 U.S. at 435–37 (Marshall, J., dissenting); *Sheppard*, 384 U.S. at 340–41.

[336] *See* KANE, *supra* note 7, at 63. The trial of Charles Manson attracted public attention due to the bizarre and gruesome nature of the crimes. *Id.* Similarly, the multiple murders in addition to the sexual assault on a minor child in the Kellie case attracted large amounts of public interest. *Id.* at 64. In *Sheppard*, during an inquest held by the coroner in the school gymnasium, the hostility toward the defendant was so great that "when Sheppard's chief counsel attempted to place some documents in the record, he was forcibly ejected from the room by the Coroner who received cheers, hugs, and kisses from ladies in the audience," 384 U.S. at 340.

[337] *See* GERALD, *supra* note 95, at 66–67. Gerald points out that, in *Irvin v. Dowd*, the defendant:

> was accused of six murders and several robberies so violent that the media, the police, and the populace joined in indignation. Although the community did not resort to the use of the traditional rope and tree, the spirit of lynching existed. Other communities experience similar hostility upon occasion and courts are tested when they insist on providing due process in the pretrial stage.

Id.

[338] *See* Robinson, *supra* note 3, at 1328.

criminal defendants.[339] Taking all of these factors into consideration, a court could find that a high-profile criminal defendant's privacy rights, at least in some circumstances, outweigh the presumption of openness in judicial proceedings and thus allow the defendant to proceed anonymously throughout the trial.[340]

Even if a court does not think that a high-profile criminal defendant has a substantial privacy right that outweighs the common practice of openness in judicial proceedings, criminal defendants still have an important Sixth Amendment right to a fair trial.[341] This constitutionally protected right is just as important as any asserted privacy right.[342] Courts have protected the high-profile defendant's Sixth Amendment right to a fair trial at the detriment of the media's First Amendment right to freedom of the press in cases where judges have issued prior restraints on the media's ability to publish certain information relating to the case.[343] In 1976, in *Nebraska Press Ass'n v. Stuart*, the United States Supreme Court set out a three-part balancing test for a trial court to use in determining whether a prior restraint is constitutionally permissible in a criminal trial setting: (1) "the nature and extent of pretrial news coverage;" (2) "whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity;" and (3) "how effectively a restraining order would operate to prevent the threatened danger."[344] Therefore, in deciding whether to permit a high-profile criminal defendant to proceed anonymously, a court must also balance a criminal defendant's Sixth Amendment right to a fair trial with the First Amendment presumption of openness of judicial proceedings.[345] In weighing these competing constitutional interests, a trial court could use the three factors outlined in the *Nebraska Press* Court's three-part balancing test to see which interest should prevail.[346]

In applying the three factors outlined in *Nebraska Press* to a high-profile criminal case to determine whether to allow a high-profile criminal defendant to proceed anonymously, the criminal defendant's right to a fair trial would most likely outweigh the presumption of

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[339] *Id.* at 1327–28; *see* Burnett, *supra* note 317, at 130–31.

[340] *See Aware*, 253 F.3d at 685; *Frank*, 951 F.2d at 323; *S. Methodist*, 599 F.2d at 712–13.

[341] *See* U.S. CONST. amend VI.

[342] *See Neb. Press*, 427 U.S. at 562.

[343] *See id.* (noting prior restraint issued in trial court).

[344] *Id.*

[345] *See id.* at 561.

[346] *See id.* at 562.

openness of judicial proceedings, thus permitting anonymity.[347] In *Nebraska Press*, the Court found that the trial judge was "justified in concluding that there would be intense and pervasive pretrial publicity" because coverage of the murders dominated the media immediately after the crime occurred and because only a couple of days after the murders, a reporter revealed that the defendant had confessed to the crime.[348] Similarly, in criminal contexts, anonymity should be allowed because the nature and extent of pretrial news coverage in high-profile criminal cases is often intense and prejudicial to the defendant.[349] As Justice Lewis Powell argued in *Nebraska Press*, in issuing a prior restraint, a trial judge must consider the other alternatives listed in *Sheppard* that do not threaten First Amendment rights as severely as do prior restraints.[350] In high-profile criminal cases, however, other remedies to mitigate the effects of unrestrained pretrial publicity have proven extremely ineffective at protecting a high-profile defendant's right to a fair trial.[351] Furthermore, the Court in *Nebraska Press* did not allow the prior restraint because the defense did not meet the heavy burden of demonstrating that, without a prior restraint, the defendant would not receive a fair trial.[352] In that case, it was not evident that further publicity, unchecked, would distort the views of potential jurors so extensively that they could not render an impartial verdict.[353] In high-profile cases, a court would analyze how effectively anonymity would operate to prevent unfair pretrial publicity from biasing potential jurors.[354] As stated previously, allowing a high-profile criminal defendant to proceed anonymously would effectively prevent prejudicial media reports about the defendant from reaching potential jurors.[355] Weighing these three factors, a trial judge could certainly find that the criminal defendant's Sixth Amendment right to a fair trial prevails over the First Amendment rights of the press, thus permitting the defendant to proceed anonymously.[356]

Critics of criminal defendant anonymity might say that it would be an ineffective remedy to protect a defendant's right to a fair trial

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[347] *See id.*; *Stegall*, 653 F.2d at 186.

[348] 427 U.S. at 562–63.

[349] *See, e.g.*, *Mu'Min*, 500 U.S. at 418–19; *Sheppard*, 384 U.S. at 341.

[350] *Neb. Press*, 427 U.S. at 571 (Powell, J., concurring).

[351] *See supra* notes 211–278 and accompanying text.

[352] *See* 427 U.S. at 569.

[353] *Id.*

[354] *See supra* notes 301–313 and accompanying text.

[355] *See supra* notes 301–313 and accompanying text.

[356] *See Neb. Press*, 427 U.S. at 562.

because, similar to prior restraints, anonymity is completely at odds with the presumption of open judicial proceedings.[357] This is so because the public does not have the ability to learn the defendant's real identity; thus, the reasons justifying anonymity would never outweigh the openness presumption.[358] Unlike prior restraints, however, with high-profile criminal defendant anonymity, the media can still attend the trial and report on the issues and the case's judicial process.[359] Therefore, even if a high-profile criminal defendant's right to a fair trial prevails in the balancing test, the openness of judicial proceedings would not be entirely destroyed,[360] as it would if a court ordered a prior restraint on the media.[361] Thus, anonymity is an effective remedy because trial courts could permit high-profile defendants to proceed anonymously without completely invading the public and the media's rights under the First Amendment.[362]

As stated above, anonymity is not a litigation strategy beneficial to all high-profile defendants.[363] It is a strategy some high-profile defendants in some situations may choose to ask the judge to employ, given all the options and facts in a case.[364] The biggest drawback of this remedy is that some defendants, due to their recognizability based on appearance, would have to waive the right to be present during the trial, which could send negative signals to the jury in some circumstances.[365] Another problem with anonymity for a high-profile defendant is anonymity itself: sometimes celebrity status can help high-profile defendants get special treatment from jurors.[366] A trial judge has discretion to weigh the factors and decide if the right to a fair trial is in jeopardy before ordering anonymity; indeed, a judge would not

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[357] *See id.*

[358] *See id.*

[359] *See Stegall*, 653 F.2d at 185. Although the press can attend the trial, with my solution, the defendant's identity will not be revealed to anyone in the courtroom. The high-profile defendant will be referred to as John or Jane Doe, depending on the defendant's gender. Unless the defendant is so famous that he is recognized by his appearance alone, this would prevent the press from learning of the defendant's identity. Nevertheless, if the defendant is recognizable based on appearance, the only way to keep the press from discovering his or her identity is for the defendant to waive his right to be in the courtroom.

[360] *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 604 (1980) (Blackmun, J., concurring); *Stegall*, 653 F.2d at 185.

[361] *See Richmond Newspapers*, 448 U.S. at 604 (Blackmun, J., concurring); *Neb. Press*, 427 U.S. at 562.

[362] *See Stegall*, 653 F.2d at 185.

[363] *See supra* notes 317–320 and accompanying text.

[364] *See supra* notes 317–320 and accompanying text.

[365] *See supra* notes 317–320 and accompanying text.

[366] *See* Robinson, *supra* note 3, at 1330–33.

utilize a remedy in a case where doing so would not protect the constitutional rights of either side.[367] Despite its drawbacks, anonymity, in certain circumstances, can help protect a high-profile defendant's right to a fair trial.[368]

CONCLUSION

Because the prejudicial effects of pretrial publicity on a high-profile defendant's Sixth Amendment right to a fair trial are often enormous, courts need remedies that strike the proper balance between a high-profile criminal defendant's right to fair trial and the media's freedom of press rights under the First Amendment. Over the years, courts have applied such remedies as venue changes, postponement, voir dire, jury instructions, and sequestration—all of which are highly ineffective at protecting a defendant's right to a fair trial. In addition to utilizing Whitebread and Contreras' *Sheppard-Mu'Min* remedy, which imposes gag orders on trial participants and fashions voir dire after the standards set out in *Mu'Min v. Virginia*, courts should allow high-profile criminal defendants to proceed anonymously. Anonymity fills the gaps of the *Sheppard-Mu'Min* remedy in two ways. First, permitting high-profile criminal defendants to remain anonymous during the judicial proceedings prevents the press from reporting damaging background information about the defendant that could negatively influence potential jurors, because the media would not know the defendant's true identity. Second, any pretrial information about a defendant that does reach potential jurors most likely would not have harmful effects on the trial's fairness because anonymity prevents impaneled jurors from connecting the defendant with any information about the defendant contained in pretrial news reports.

Courts have allowed party anonymity in civil trials for over twenty years to protect the substantial privacy rights of plaintiffs. In addition to civil plaintiffs, courts should apply anonymity to high-profile criminal defendants because they have substantial privacy and fairness rights that similarly need protection during judicial proceedings. Without high-profile criminal defendant anonymity, the pretrial publicity associated with high-profile cases will continue to influence negatively potential jurors, thus violating a defendant's Sixth Amendment right to a fair trial. Courts should not tolerate such a constitu-

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[367] *See supra* notes 330–362 and accompanying text.

[368] *See supra* notes 301–368 and accompanying text.

tional violation in a judicial system that requires triers of fact to render impartial decisions.

JAIME N. MORRIS